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Gerhard Dilcher

The Germanists and the Historical School of Law: German Legal Science between Romanticism, Realism, and Rationalization

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Abstract

The essay, originally written in German as an introduction to a volume of collected papers, shows the influence of the Historical School of Law on legal, historical and social sciences in Germany throughout the 19th and even 20th centuries – a time span running contrary to the dominate view that sees the end of the School in the middle of the 19th century. In my view the School constitutes not only a method for developing norms of private law out of the historical materials of Roman and German-Germanic laws, but is based on a wider conception of culture, law and history that is also connected to the political positions of that time. In Savigny's founding pamphlet, »The vocation of our time ...«, two major theoretical topics for this long-lasting influence can be found: The Romantic one, which views law as a part of culture and parallel to language and custom, based on the »spirit of the people«, and, on the other side, the rationality of the European tradition of Roman law, which was developed and administered by jurists. These two basic points, in part standing in contradiction to one another, form a fertile tension that provides an impulse to the intellectual discussions and new movements in jurisprudence and history analysed in the text. Realism, founded in the connection of both sciences to political and social life, builds a kind of »basso continuo« and acts as a counterbalance to the former two. And it is in this context that the works of Jacob Grimm, Puchta and Beseler, Heinrich Brunner, Georg von Below and others are analysed, in particular the works of Otto von Gierke and Max Weber. Finally, evidence is furnished that a new image of the medieval period, and its impact on law, as a centre of Western identity was outlined in the 20th century by authors like Ernst Kantorowicz, Fritz Kern, Otto Brunner and, last but not least, by Harold J. Berman (walking in the footsteps of Eugen Rosenstock-Huessy), all of whom were situated in different ways within the tradition of the broader, cultural-based Romantic view.

Gerhard Dilcher

The Germanists and the Historical School of Law: German Legal Science between Romanticism, Realism, and Rationalization*

I. Introduction

1. *Issues, Problems, Approaches*

The title and text of this essay look back to a series of our older and newer papers on the history of law in Germany. On occasion of their republication we had intended to contribute a preface. The intended brief introduction gradually developed into a critical review of the history of our own area of research, the history of Germanist law within the Historical School of Law. One issue emerged as central: whether the review pertains to the history of law or, at the same time, to an integral part of the political history and humanities in Germany as well. Especially in those areas in which method and subject matter of law transcended disciplinary boundaries it appears to have impacted the German and European scientific enterprise as a whole, which gave the science of German law and its history its distinguishing feature. With the focus on the Germanic elements of law and its ideological elevation in the course of the 20th century, the recognition of this unique characteristic had been lost.

The Romanist »sister« science, however, ought not to be neglected, as the ascent of both branches of law was grounded in the same founding of a school of law. Otto von Gierke, in his essay entitled »The Historical School of Law and the Germanists,« for which the present essay transposed the order of the nouns, dedicated to it a summative account at the end of the period.[1] For us it became a part of this history, as an important and authentic testimony. Some time ago the Italian political scientist Pierangelo Schiera emphatically emphasized this aspect of science in Germany as a »civil laboratory,« and a factor in the development of the German constitution.[2]

Yet the status of Germanist legal science has recently been put under critical scrutiny by the academic discipline's exploration of its own history – an exploration that is to be praised. As far as this story goes, the Germanist element, similarly to Germanist philology, put its stamp on the name and identity of the discipline and was perceived as one of the foundations of German national identity, of the nascent »late« nation. This aspect of its history, as well as the »social element« operating on a perceived anti-Roman and anti-individualistic basis, was then integrated into the ideological amalgamate that constituted the program of the Nazi party. This oversimplified and thereby misleadingly constructed depiction of a continuity in Germanist legal science made it a predecessor of NS legal ideology and turned those who perceived themselves as representatives of political liberalism into representatives of illiberal collectivism.[3] This summary is intended to show, as are the studies presented in the book, how an account that precisely differentiates between different parts of the history of German thought, and contextualizes them properly, is superior in accounting for the continuities and changes in German political

* The English version of the text is largely identical to the introduction to the collection of essays in Dilcher (2016a). Translation by Prof. Lutz Kaelber, University of Vermont, USA.

1 Gierke (1903).

2 Schiera (1992). The Italian version was originally published as Il laboratorio borghese, 1987.

3 Dilcher (2013b) contains an extensive critical analysis of this perspective. It is reflected in the conference volume Rückert / Willoweit (eds.) (1995). On the misguided characterization of Gierke as representative of collectivism see below III. 3. In his retrospective account Gierke (1903) 26 counted Germanists active in the politics of law among the liberals, demarcating them from Germanists and Romanist factions, which he counts among the political reactionaries.

thought and intellectual history, as well as in analyzing the characteristics of National Socialism and putting it into sharp relief.

An analysis by E.-W. Böckenförde has previously shown how jurists, historians, and political scientists came together in providing an account of German constitutional history, a history that related fundamental issues and guiding ideas of scholarship to the goals of the national, liberal, and constitutional movement.[4] This approach, which influenced our own studies, is congruent with ours. The recently published study by Johannes Liebrecht of the Germanist legal historian Heinrich Brunner takes the same perspective;[5] its incorporation in our analysis helped bridge a gap in our account concerning the topic of realism.

In looking back to and reflecting on our own earlier writings, we chose three terms to characterize our own line of analysis and interpretation of continued scientific import of the German Historical School of law, captured in the subtitle: Romanticism, realism, rationalization. They were chosen to capture heterogeneous developments and tendencies. While they do not represent criteria of analysis in the strict sense, they are intended as guides through a landscape of legal science by highlighting a path and pointing to profiles and ridge lines in this landscape.

One element that has consistently affected our thought, though sometimes on the subsurface, is Romanticism, derived from Savigny and for immanent reasons taken up mostly by the Germanists. This line of interpretation, as we should note to prevent a misunderstanding, transcends the issues of »Savigny as a Romanticist« or the »German legal science in the era of Romanticism.«[6] Since the concept of Romanticism has always remained vague, and is perhaps impossible to define, and since law and legal science, due to its rationality and basis in reality, does not find itself reflected in characteristics of Romanticism expressed in poetry, literature, the fine arts, or music, we will provide a series of criteria that can be used to both recognize and characterize Romanticist elements in law and especially in the history of law. These criteria are not based in theory but derive from a number of texts, particularly Savigny's *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* of 1814.

For the purpose of our inquiry it is necessary to use the concept of Romanticism in a broad sense of the word. Otherwise, it would be impossible to trace its reach in the realm of legal science and across an entire century. Such a broad understanding of the Romantic movement corresponds to older as well as newer tendencies. Rüdiger Safranski developed an account in which Romanticism is depicted as a »German affair« and basic frame of reference whose effects extended not merely beyond the end of the 19th century and World War I.[7] With little hesitation others from abroad, too, viewed Goethe, for example, as a representative of a German world view designated as Romanticism (while in Germany Goethe is regarded as classicist and enemy of Romanticism).[8] A historian of law, to be addressed in more detail at a later point, wrote in his general review of history after WWI that »all humanities in Germany in the nineteenth century were held captive to this influence of Romanticism.«[9]

One aspect that stood in permanent tension with Romanticism is the rationalism of Roman law and systematic thought introduced by Savigny and his approach. On this basis, legal science developed an approach to law that Max Weber saw as part of the process of occidental rationalization that he analyzed. To a larger part it draws on the Romanist branch of law, on the Pandects, but it also relates to the Germanists. One of the studies presented here traces the development toward so-called concept-based jurisprudence (*Begriffsjurisprudenz*) and legal positivism,[10] and this

4 Böckenförde (1995), originally published in 1961.

5 Liebrecht (2014).

6 Regarding the first issue see the brief but poignant analysis (to which we will refer further below) in Rückert (2012), specifically 79–72; on the second issue Whitman (1990). Whitman has recently come out strongly in favor of a cultural-historical history of law in regard to the comparison between the United States and Europe: Whitman (2015).

7 Safranski (2007).

8 For example, the English Wikipedia article »Romanticism« includes Goethe, in contrast to the article in the German Wikipedia on »Romantik.«

9 Rosenstock-Huessy (1961) 426. On Rosenstock-Huessy see also below no. 17.

10 See Dilcher (1975).

development is, using the analysis of Max Weber, being related to rationalization later on in this essay.[11] For this reason the concept of rationalization is used here, not the broader and less specific concepts of rationalism or rationality.

Finally, realism had permeated scientific discourse and the methodology of legal science the mid-century, bolstered not only by its concomitant presence in literature but also by progress in natural science and the social sciences.[12] It has its roots in law's strong interpenetration with society and empirical facts, as well as in basic research using texts emphasized by the Historical School of Law, which did not allow legal thought to be divorced from reality. Realism can thus be seen as a continuous, harmonizing characteristic, which gained in importance in the age of »real politics« after mid-century, as political and intellectual trends carried it along. Therefore, this essay dedicates a separate section (III.) to it.

Our use of these concepts does not reflect an intent on our part to address the philosophical foundations of law.[13] Doing so would require us to delve deeply into the relations of law to German idealistic philosophy. Scholarship has demonstrated the impact of contemporary German philosophy on large parts of German legal science; however, the influence of particular individuals remains an issue of contention, and the names that are addressed in the context frequently include Kant, Fichte, Schelling, Hegel, and, in Gierke's later writings, Dilthey. Of course our analysis establishes various relationships to these philosophical issues, and it also concerns the much-discussed problem of historicism.[14] Where necessary we will address it briefly. Otherwise, we think the three main concepts represent a level of interpretation that establishes a connection between various topics and concerns inherent in the essays reprinted here, and provides a response to the hypothesis presented. It proceeds at a level of discourse below the philosophical one but directs us more strongly than philosophy toward an analysis of writings and of the values inherent in the guiding ideals and overarching questions of the time. Proceeding on this level makes it possible to discern the scientific ideas of, and the connections between, different branches of legal science, and their unique features and impact.

Moreover, our analysis does not operate on the level of a history of methods, as much as methodological questions – for example, the relations between methods in history and in law – are relevant to it; such an analysis would be particularly beneficial in the context of legal doctrine.[15] Our analysis is also not primarily concerned about close relations between legal methodology and the concept of law, which emerges as central to Jan Schröder's grand theory of law as a science[16] – though the topics overlap. Similarly, the politics of law, concerning »the ways and forms in which institutions of law applied social norms,« which is the subject of a much-discussed analysis,[17] is important throughout the 19th century and its discourses concerning the politics and theory of law, but our analysis, which concerns the scientific innovations in law, only touches on it.

Furthermore, a recent piece of scholarship on Germanist law[18] is concerned with issues different from ours. In those that relate to the 19th century, it addresses the development of legal doctrines and their scientific foundation expertly and in detail, but while it seeks to go beyond this topic on occasion, it does not thematize fundamentally novel conceptions of law in legal science, as addressed, for example, by Böckenförde and Liebrecht. The exclusive focus on private law obscures a view of the Germanists as a broader phenomenon, which can be shown in a comparison between Schäfer's views on Gierke and the classification of his scholarship and mine. Our fundamentally different approach also sheds a very

11 See below, III. 2.
12 Liebrecht (2014).
13 In this regard the following study is fundamental for an understanding of Savigny: Rückert (1984), who associates Savigny with a broadly conceived »objective idealism«; on Puchta now much more differentiated than previously Haferkamp (2004), who particularly points to Schelling, among others.
14 Beyond the classical accounts such as by Meinecke and Troeltsch, see on the current state of the discussion Wittkau (1994); Oexle (1996).
15 This is demonstrated by Falk (1989). See also Haferkamp (2004) 23.
16 Schröder (2012).
17 Ogorek (2008); the quotation can be found in the preface by Dieter Simon.
18 Schäfer (2008).

different light on common questions, and a further discussion of this approach is therefore not pursued here.

At this point these remarks concerning our basic approach and the significance of the three core concepts must suffice. Neither the approach nor the concepts are to be viewed as manifestation of a principle, but as interdependent and relevant in different degrees in different contexts. These interdependencies need not be stressed in the following in individual cases, as readers are directed toward our earlier publications. Even though our earlier remarks were not written with the same overarching perspective and line of interpretation in mind as our summary here, they provide detail and further evidence. Beyond these separate studies a general argument is present here, which allows a better understanding of their purpose. In short, the argument presented here is as follows: the elements of legal theory introduced by Savigny, applied in different ways in the Historical School of Law by the Romanists and the Germanists, constituted the basic and fertile foundation for German legal science and critical reflections that followed.[19]

Our question is therefore primarily of a nature that relates to cultural history and the history of science. It transcends the focus on the history of private law and inherent distinctions between Romanists and Germanists that many scholars have used in their analyses. Most of these analyses pertain to the Romanists, for they were crucial in the development of law toward the German Civil Code, in terms of both content and methods. Often they relied solely on a Romanist perspective in addressing the issue how the Historical School is to be classified among the categories of legal sciences, and when it came to an end. In regard to the latter, they often point to the mid-century, i. e., to the cessation of the *Zeitschrift für geschichtliche Rechtswissenschaft*, and completion of Savigny's system and his death.

Our perspective, however, directs our view more strongly toward the Germanists. As is shown below, while the aspect of systematic-rational elaboration concerning doctrine in private law predominates in the writings of the Romanists, but also among many of the Germanists (system of German private law!), the organic-historical approach of many Germanists (and some Romanists) continued to have an impact. The latter led to significant legal achievements, to a fruitful methodical discussion and a continuation of the cultural-historical approach of the Historical School of Law. These continuities converged in the scholarship of Otto von Gierke, to whom we dedicate some space.

From this view the Historical School of Law extends to the period demarcated by the turn of the century and World War I. With the introduction of the German Civil Code, a new era emerged in private law in terms of its legal texts. This turn notwithstanding, the last section of this essay will address the scientific impact the approach of the Historical School continued to have, an impact that constituted a unique German contribution within the international network of sciences.

II. From the End of the Ancien Regime to the St. Paul's Church

1. *The Historical Situation and the Founding of the School by Savigny*

We shall begin by looking at the historical situation at the time of the founding act of the »school« around 1814, »at a time that no one who experienced it in a fully aware state will ever forget« (as Savigny put in in 1828).[20] In terms of the event itself as well as its universalistic ideals, the French revolution deeply affected Germany's best minds. Germany subsequently endured Napoleonic foreign rule and exploitation, then rose as an ascending nation only to have its new social order be determined by the old powers. The Holy Roman Empire as a joint body of law and millennium-old tradition had ceased to exist. The German Confederation united its principalities merely in a loose fashion. The question of a German nation had arisen, but the political powers moved to repress the bourgeois national movement and saw the basis of their legitimacy in the divine right of kings and the Holy Alliance. The legal order

19 Emphatically Liebrecht (2014) 269 n. 236 in reference to Dilcher (1998).

20 Savigny at the beginning of the preface to the second edition of *Beruf* in 1828, in Stern (1959) 202.

retained some established common characteristics without retaining its basis of legitimacy. Above all, the legal order was fragmented. Lacking was a political actor to effect a unifying body of law, while the large states such as Prussia and Austria in the ALR and ABGB, and, based on the French model, the Confederation of the Rhine had created codifications of private law.

Given its past, for Italy the question of political unity and nation building arose in an even more potent and difficult way than in Germany. At the Vienna Congress Metternich had concluded that Italy was merely a geographical concept. Half a century later, after the founding of the nation state, Cavour noted »Abbiamo fatto l`Italia, dobbiamo fare gli Italiani« (We have founded Italy; we still have to create the Italians). He expressed with great clarity the difficulty and significance of establishing a national identity for »delayed nations.«

In Germany the recourses to the national spirit, the Germanic, as a »lieu de memoire« (place of memory) served such a function. In their own historic-specific ways similar situations were present in other European nations and groups.[21]

For the German *Bürgertum*, which was forming on the basis of an emerging awareness of a common culture, three interrelated issues arose, particularly among groups and social strata inspired by and sensitized to new forms of politics: of (1) a political constitution for the individual principalities and for Germany as a whole; (2) a common legal order; and (3), increasingly, the significance, contents, and limitations of nation and people, a German identity and thus a new political legitimation. These issues remained pertinent over the course of German history from the Vormärz and the time of revolution in mid-century to the founding of the German national state in 1871 as a Prussian-German answer to the question of political, national and constitutional order. In law the answer was the codification of law culminating in the establishment of a Civil Law Code in 1900. World War I, German defeat, and the peace at Versailles were the closing acts for this period in German history, with far-reaching consequences for, among other things, the national consciousness of the *Bürgertum*, which now was often motivated by *ressentiment*. This is relevant below in the context of the issue of continuities with Hitler's National Socialism.

This historical situation is what one should keep in mind in trying to understand the founding of the Historical School of Law in its significance and long-lasting effects over the entire century and beyond, and its influence on, and consideration in, other sciences and other nations of culture. This was not merely an issue of bourgeois and political order of law, but also one that pertain to its legitimation and the establishment of a national identity. For these reasons »German Romanticism« has specific features within the larger European movement of »Romanticism.«

The intellectual founding of the Historical School of Law goes back to Savigny, and to Savigny alone. Others, such as the often-cited Romanist Gustav Hugo at Göttingen, as well as Savigny's Germanist colleague Karl Friedrich Eichhorn, helped clear the path for the historization of law after the period of the »law of reason,« but they did not create a document for a fundamentally novel establishment of law on a cultural-historical foundation.

Savigny's famous *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft*, complemented by the creation of the *Zeitschrift für geschichtliche Rechtswissenschaft* in 1815, constituted such the starting point. Savigny elaborated on his thought from a legal perspective in the volumes of the *System des heutigen Römischen Rechts*, and from a historical point of view in the *Geschichte des Römischen Rechts im Mittelalter*. Short remarks have to suffice. The *Beruf* was an ambiguous and influential document, which ultimately entrusted the legal profession with the development of (private) law but also hypostasizes a connection to popular beliefs and attitudes.[22]

To that end Savigny developed an often-cited historical theory of law, the core of which he explained in a few sentences that have since become classic expressions of his thought: »Law is unique to each people, just as language, morals, social order« are – as he notes, an »organic connection.« From this »early state,« the »state of nature,« influenced by the »ascent of culture,« an

21 On this issue covering a broad spectrum, from Scotland (Ossian) to Germany (The Song of the Nibelungs) to Finland, Stolleis (2014).

22 The following quotes are all taken from Savigny's *Beruf* and can be found in the edition by Stern (1959), mostly on pp. 76–79 and 88 f.

»artificial« condition emerged, parallel with, as we would say today, the differentiation of culture, activities, and professions. This evolution includes law with its original embeddedness in language and morals; it therefore rests, on this higher level of culture, on two foundations: it remains part of the life of the people (*Volksleben*), but its further development through science is entrusted to jurists, as a body of the people, and it therefore continued to represent the »collective consciousness of the people,« later known as »spirit of the people« (*Volksgeist*). But morals and people's beliefs no longer create law; jurisprudence does. This creation is to continue through »internal forces,« »acting quietly,« not through the arbitrary act of a legislature. Savigny thus disagrees with the tendency of his contemporaries to see the creation of law from the perspective of the Enlightenment and a systematizing law of nature. Such a perspective his opponent in the so-called dispute about codification, Thibaut, had supported, as a means to unify Germany legally. Many a commentator has noted an accordance with the program of an intellectual awakening of Johann Gottfried Herder, echoing the title of his »Voices of the People in Song«: The connection between nature and culture, the organic understanding of history, the tension between individuality and collectivity – all these points of view connect Herder with Savigny, and, similarly, with Goethe, as well as with Romanticism. For Rüdiger Safranski, Herder thus was the starting point in his account of Romanticism.

For Savigny the counterpart to collective action of the people was the status of jurists. Historically they are inseparably linked to Roman law, which is imbued with a high degree of rationality, is *ratio scripta*, and represents a »reckoning using concepts.« On the other hand, Roman jurists have a »most vivid conception« of the applicability of law, so that »theory and practice are actually not all that different« to them. This unity of theory and practice is something we should keep in mind when we will address the process of rationalization in the 19th century thematized below. Savigny succeeds in performing a type of mental summersault in reassigning the responsibility for the continued development of law »under advanced cultural conditions« from the mind to the people to the jurist, who is law's executive agent! This line of thought is nowadays called Savigny's »specialists' doctrine.«

The responsibility to create law in this way Savigny assumes for himself, in his great legal writing, programmatically entitled *System of Modern Roman Law*. Every word has to be weighed carefully. The word »system« relates to the approach of enlightened law of nature, of a logical structuring of rather topically and pragmatically arranged Justinian law and its continued development in the Usus modernus Pandectarum, a law of nature Savigny otherwise rejected. In choosing the title of »Roman Law,« he declares it a subject matter that continues to play a definitive role. The addition of the word »modern,« however, signifies his strategy of providing legitimacy to a program of encompassing modernization within this material, specifically the separation of material which is no longer useful, or »vital,« for the present time and a new, *bürgerlich* society. This program of modernization, together with the »system« approach, is relevant as »rationalization« for our later analysis. This part of Savigny's program, focusing more on its legal aspects and the creation of law, specifically the methods of the application of law, is perhaps best captured by Savigny's own concept of a »historical science of law.« If so, the concept of a »Historical School of Law« would apply to the broader, cultural-historical aspects of his program. This will be addressed at the very end of this essay.

As is well established, so-called Pandectism further developed Savigny's system-program, beginning with the *Lehrbuch der Pandekten* and continuing with Puchta and others to Windscheid, culminating in the private law codification of the Civil Law Code of 1900, which reflected its normative influence. This branch of legal science founded on Roman law was recognized both in Europe and around the world, and it overshadowed the exegetical schools in France and Austria, which were oriented toward codifications imbued with Enlightenment thought. This characteristic gave the German Civil Law Code the status of the most modern, scientifically most developed codification of private law in international comparison. Its chief rival was the less legal-technical and more intuitive, »popular-traditionalist« Swiss codification of the ZGB, which reflects Germanist views more than Pandectist ones.[23] It therefore not

23 Cf. Caroni (2014), and Thier (2014).

only won Gierke's strong approval, but also served as a model for a new codification based on European ideas, that of Kemalist Turkey in 1927.[24]

In light of this development the term »Romanticism« raises the issue of »Romanticist« elements in Savigny's theory of law, which he developed in his *Beruf*. The answer to the question in how far Savigny can be considered a »Romanticist« or rather a »Classicist« is controversial, as we have seen; and parallels to Goethe and the similarities between him and Savigny as an intellectual have often been pointed out. They are not to be discussed here, however. What is certain is that Savigny, especially in those years, was in close personal contact with Romanticist circles. The Bretanos, von Arnim, and the Grimms socialized with him in Marburg, at Savigny's Hof Trages, and in Heidelberg. He was therefore well versed in Romanticist thought, but we cannot address the issue of »Savigny as Romanticist« here. Rather, we will address elements in his theory of law that corresponded to those in Romanticism as an intellectual movement, particularly the notion of a continued import of Romantic influences. These Romanticist colorings of his thought were obviously important in harmonizing his polemic writing with the spirit of his time.[25] They explain his immediate »victory« over Thibaut's arguments and late-Enlightenment approach, and why the tradition founded by Savigny had, as we will show in the following, certain cultural and intellectual impacts that made his thought relevant throughout the entire 19th century and into the 20th century.

2. *Discontinuity, History, and Legitimation of Law*

Both in his theory of law and his writings on law as a science Savigny provided an answer to a legitimation crisis in law, especially private law.[26] The historical legitimation of the ius commune in the form of the Usus modernus Pandectarum was shaken by the breakdown of the Ancien Regime and its society based on estates, and obsolete in this form. Yet by 1800 the legitimation of natural law constructed according to the rules of reason was no longer possible due to epistemic and historical criticism. Kant created the former type of criticism in its prevailing form, while the later had been formulated as early as in Montesquieu's *Spirit of the Laws*. Montesquieu's early form of legal historicism is reflected in the terms science of legislation and natural law.[27] Opposing Thibaut, Savigny rejected the establishment of legitimacy by way of legislation, that is, through the state – though, in the case of Germany, what state? – as »inorganic« and »arbitrary.« In the *Beruf*, Savigny developed a multifold scheme of legitimacy. It has its roots in a historical reliance not on the immediate past (as the Usus modernus does) but on an idealized one, Antiquity.

A certain tension arose at this point. Based on its foundation on the people, Germans' national past provided law with content and legitimacy. Based on the »specialists' doctrine,« such content and legitimacy derived from the distant past of the Roman jurists, whose law, resting on classic rationality, was viewed as a model for all nations of culture. This dual foundation of legitimacy, in Savigny's scheme, encompassed the two bodies, the Roman ius commune and the Germanic-German particular law. Savigny provided jurists trained in his school with the legitimacy to change these bodies of law into a present form. He entrusted a body of jurists with the modernization of law for the nascent civil society, based on their advantage of having their profession more strongly than others' rest on rationality.

Savigny had created a new theory of law, which was highly pertinent to the immense changes from 1789 to 1806 to 1815. The introduction of the dimension of time by Reinhard Koselleck and his theory allows us to better understand its significance in terms of cultural history today. Savigny's theory of law focused on the »threshold period«

24 Wieacker (1967) 495.
25 Wieacker (1967) 362 appropriately refers to the »banner of a legal science out of the spirit of the people.«
26 A condensed summary of this new approach can now be found in Rückert (2012).
27 See Dilcher (1969).

(*Sattelzeit* – R. Koselleck), which came with a semantic transformation of the entire body of political-social language and uncertainty in orientation.[28] This had to have tremendous effects on concept-bound sciences such as law. No longer could the principle *historia magistra vitae* be trusted, according to which one could rely on past precedents in the normal flow of time, as was the case with the Usus modernus, and parallel to it the Germanist science of particular law. Rapid progress and the attendant change in society and politics, not only in revolutionary France, but also in the German principalities, made this inadequate. At the latest, this became clear with the intrusion of revolutionary France into the frail structure of the old order. The French civil code, its German derivatives, and the Austrian late-absolutist ABGB made the Prussion ALR with its estate-based character look dated. Thus in the realm of law, too, history as a given realm of experience (*Erfahrungsraum*) and horizon of expectations concerning future action (*Erwartungshorizont künftiger Gestaltung* – R. Koselleck) had drifted apart so much that a direct reliance on the past could no longer provide an answer.[29] The Göttingen school, Pütter und Hugo, attempted this still, although it afforded a greater role to historicism. In contrast, Savigny's approach provides a theoretical bridge to more remote but historical relevant realms of experience, which can be made useful for the entirely new horizon of expectations in modernity after the Enlightenment. The *Bildungsbürgertum*'s identification with Antiquity became the bridge to classic instead of »common« Roman law; and the identification with national history led to Germanic-German law.

In 1814 Savigny recognized a deficit in legitimacy for both the Usus modernus of ius commune and late-Enlightenment rationalist thought in law that had been brought about by rapid social change. He does not seek a solution to the legal problems at hand by recourse to the immediate past, a la Usus modernus. But he also does not trust the rationalist »arbitrary decision« (*Willkür*) of the legislator, or science proceeding in a geometrical manner (*more geometrico*). He therefore casts a wide net, depicting the immediate past, the Enlightenment period of the 18th century, as an era that cannot function as a model. (The following examples are taken from the *Beruf*.) He attributes to that period a lack of sense for everything that is capable of making history exemplary, that is, »salubrious and fruitful.« It is motivated by an »unenlightened drive toward education,« a harsh reprimand to the period of the Enlightenment. In its stead Savigny develops the previously mentioned cultural theory of the development of law. It allows history to be used in a »salubrious and fruitful« manner, that is, in making accessible more remote realms of experience: those conditions »close to nature,« in which the nascent spirit of the people could have a direct effect, and the classic period of legal culture of the Roman jurists, providing a universal model. Germanists are given the role of accessing the former; Romanists, the latter. The theoretical approach of the »system of modern Roman law« made it possible to extract from it a legal system that was ready to take on future challenges. The foundation of private law on the individual and his will, on property, declaration of interest, and legal transaction was fully capable of meeting the expectations of civil society toward the future.

This clever mental maneuver allowed the central legal figure in Roman law, the *civis romanus* as *pater familias* in slave-owning society, to be replaced with the public citizen of modern civil society, resting his status on autonomy under private law, liberty, and equality. Many realms of the law in Antiquity, for example, the law of the family and of slaves, thus became irrelevant and no longer had to be considered. In a sense, they fell through the cracks of the system of modern Roman law. Antiquity's more remote realm of experience provided the space to accommodate the expectations of a modern civil society.

The Germanists could find out on their own where to find an approach equally effective for analyzing their historical legal matter with a view toward its development for the future. The most immediate part of Romanist thought in Savigny,

28 Koselleck (1972), (1975a), especially 390–423, (1975b), especially 673 ff., 702 ff. with many references to the Romanticism.

29 Koselleck (1979a), especially (1979b) and (1979c).

which relates to originality and people as a collective creator of culture and in its »spirit,« was available to them to that effect. We shall see to what extent they used this space in the creation of law and how well they achieved this task. At the very least, in the purified form of Roman law, placed on its classical foundations, unresolved problems and areas for analysis remained that could benefit from drawing on the experience of Germanist forms of law.

Savigny had placed a staunchly forward-looking and rational, Roman-law program under the banner (*Panier*–Wieacker) of Romanticism, appealing to the national mood around 1814: using an expansive theory of law and culture, he connected law to the people, with its identity in culture and language. In this way he »Romanticized,« to use Novalis's famous expression, law and the science of law, »giving the everyday a higher meaning, the habitual a mysterious appearance, the known the dignity of the unknown, the finite a semblance of the infinite.«[30]

Using this line of thought, private law, the regulation of what is mine and what is yours – which was Savigny's main focus – can be related to mundane issues, the everyday, habitual, known, the finite, irrespective of its claim to universal validity. Bestowing a legitimizing function upon the history of a law by connecting it to the people, as well as the classic perfection of Roman law, Savigny replaced the old legal-philosophical and legal-theoretical legitimation of justice derived from ancient, Christian, or rationalist impulses of natural law. His legal theory had been planted on the soil of historicism's new perspective, whose value relativism did not cause it to suffer a loss in legitimacy.[31] Legitimacy could otherwise have only be derived from the state's positivist creation of law, which Savigny specifically rejected as »arbitrary act.«

His theory closed this gap, but not without having to live with internal logical contradictions between rationalism and historicism, whose consequences we shall address later. These contradictions are evident not only in the »specialists' doctrine« bringing about a loss of collective legitimation of the people, but also in his theory's extensive temporal dimension: the immediate past did not constitute the realm of experience, but the extensive recourse to the origins does, which secures identity. The intended mastering of the future is entrusted to the program of modernization, which is expressed in the term »system of modern Roman law.«

3. *The Romantic as a Return to the Origins: People, Culture, Identity*

It has become clear from the above to what extent Savigny's program contained Romantic elements, which as a »banner« (Franz Wieacker) may help explain its great public success in the context of 1814. Those elements remain influential due to the idea of the people and the national spirit as the founding principle of the creation of law, that is, the connection between law and a national identity founded in history. In this context Savigny himself noted that peoples »become individuals only in this manner,« an important idealist basic idea of historicism of the 19th century, probably going back to Herder. To Germanists, the nature of their texts by itself suggested finding such an identity in the Germanic roots and the Empire of the Middle Ages; their legal matter therefore derived from a Romanticist point of view. In Novalis's sense, this perspective could widen to Europe, the »Occident.« It addressed the *Bürgertum* in a people, which as a »delayed nation« was on a path toward national unity and the creation of a national state, but always also saw itself as the bearer of the European tradition of the Holy Roman Empire. Especially for the writings of the jurists of the *ius germanicum*, the Germanists, these notions could serve as an impulse and theoretical guideline. The rationality of the legal profession and the rational program of the Romanist sister science prevented a detour into the romantic-irrational. Both had to create socially useful, that is, in the context of modern civil society, modern rules of law and institutions of law. Both groups, especially the Germanists, but also the Romanists, were challenged to legitimize their legal work culturally and historically, according to the basic ideas founded in the schools, through broad historical

30 The famous sentence, quoted in Safranski (2007) 56.

31 See above note 14.

analysis. Otherwise, they would have moved beyond the theoretical foundation set by Savigny – after whom, from the second part of the century onward to this day, a core journal of the discipline is named.[32] With this general scientific concept the Romantic contribution to the tradition of the school remained influential.

Yet as we have noted above, a full development of all elements of Romanticism, as they could be found in poetry, literature, music, and fine arts, was impossible in law and legal science due to their internal rationalism, their closeness to reality, and their close connections to society. In order to develop our approach, i. e., the aforementioned argument of a long-term fruitfulness of this Romantic imbuement, we have to establish criteria characteristic of such Romantic traces in legal science. The establishment of such criteria, given the fuzzy nature of Romanticism as a general phenomenon, cannot be based on deduction. Rather, we wish to establish those core traits and elements we encounter when looking at the founding of schools and their further development, and whose attribution to Romanticism seems plausible. We consider Romanticism as a reaction to a fundamental transformation around 1800 (Koselleck's »threshold period«). History as an immediate sphere of experience (*historia magistra vitae*; in law: Usus modernus pandectarum) is no longer considered a legitimate approach for addressing expectations about the future, nor is the rationalism of the enlightened law of nature, which Savigny disqualified as an »unenlightened drive toward education.« Because of this a double recourse to »origins« existed, of the people and of the process of civilization in Europe since Antiquity. Wieacker recognizes in these characteristics Friedrich Meinecke's duality between »citizenship of the world and the idea of a nation.«[33]

As compared to the Enlightenment, Romanticism created a new consciousness about history and historicism, which becomes the foundation of historicism's approach and way of explaining the world. This is the context of the founding of the Historical School of Law, a »legal science based in history.« The use of terms in Savigny's *Beruf* points to basic ideas that it shares with Romanticism, and such terms of speech, as indicated above and below, provide evidence of the presence of Romanticism as a counterposition to a purely normative-abstract understanding of law. The following guiding ideas support such an interpretation. The quotes are from parts of the *Beruf* mentioned before.

The fundamental ideas can be stated as follows:

1. *Recourse to the historical beginnings as origin, nature*. The last element, according to Savigny, is present in the »early age of peoples,« when »powers and activities« are »inseparably tied to nature« and develop out of »inner necessity.« Law appears, in this stage, as »grasped by the senses,« not in abstract thinking, and therefore in »eminently natural condition.«

2. *Law exists at first in unity with language, morals, and order as an emanation of folk belief.* In this function peoples »become individuals.« »With the development of culture … social activities among the people become differentiated«; »this organic unity between law and the nature and character of the people continues as time progresses.«

3. *The organic connection between people and law exists within a more universal concept of culture, founded on language, morals, order.* The people's identity can be derived from history and culture in this way, and be contrasted with the Enlightened-rationalist, voluntarist identity of a political nation based on volition, founded on social contract, and its law as an act of legislation, with the model of the state as mere function and machine. This is the ideological foundation of the organic theory of the state, which played a role through the entire century.

4. *Culture is a collective product in all aspects.* Its basis is language, as »steady, continuous exercise.« In language not only poetry develops (Herder's *Stimmen der Völker in Liedern*, Achim v. Arnim's *Des Knaben Wunderhorn*, the tales of the Brothers'

32 The successor to Savigny's *Zeitschrift für geschichtliche Rechtswissenschaft* was the *Zeitschrift für Rechtsgeschichte*, which came out in 1861 and, having been associated with the Savigny Endowment in 1883, has since been referred to as *Savigny-Zeitschrift*. Erler (1990). Interestingly, Romanists generally abbreviate the title as SZ, whereas Germanists use the abbreviation ZRG.

33 Wieacker (1967) 411.

Grimm), but, for Savigny, also law based on »powers that act silently.«

5. *Law as a part of culture is depicted as a unitary phenomenon; and it can only be understood as such.* Even as with the development of culture the activities among the people increasingly differ from one another, that is, differentiation occurs and law »becomes a separate science in the hands of jurists,« the organic connection to popular culture as legitimation of law and the development of law is retained. To Savigny, the state is the »embodiment of a spiritual community of the people,« and constitutes its foundation as »an invisible entity of nature,« so that in the state the people could find its »true personality« (Savigny, System I, pp. 21 f., 23). Complete scientific comprehension necessitates relating law to this universal context. The transgression of boundaries in science as a »holistic impulse« (Joachim Rückert), a principle of Romanticism, is therefore always called for, and mere doctrine is not sufficient of a »legal science« in Savigny's sense. Even the interpretation of a single legal provision was to be conducted under consideration of its history (historical science of law).

6. *The connection to people's consciousness and life, to nature and culture meant a »Romanticizing« of the law in its basic definition developed by Novalis.* If law, in this sense, can be seen as »the common« in its daily proceeding, then its connection to language and other aspects of culture, even to the »existence of man himself« and the development of peoples as individual entities, give it the kind of »higher meaning« that Novalis perceived as Romanticizing a subject. History becomes »a higher office.«[34] This is an anti-rational concept, which does not reduce law to deduction, system, and doctrine. Rather, law becomes one of the determinants and integrative aspects of culture in its particular historical manifestation.

One aspect of Savigny's thought on the creation and legitimation of law, as it relates to history, is to be emphasized, as it was this characteristic that gave his approach a much longer-lasting impact. While personally religious in a Christian-ecumenical sense, Savigny did not attempt to establish a direct religious legitimation of law. This is anything but what might have been expected. His student Puchta did raise the question about Christ in law and about law and divine order.[35] Working at the Prussian court, as Savigny did, Friedrich Julius Stahl, who was influenced by Romanticism and adhered to the Historical School, wrote his *Rechts- und Staatslehre auf der Grundlage christlicher Weltanschauung* (1845/46) and legitimized in this way the principle of monarchy (*Das monarchische Prinzip*, 1845). The relativism of values of historicism led him to seek security in a religious foundation even for science. Savigny disagreed: for him, Christianity was merely a historical-cultural foundation of law; only by reference to the »moral orientation of human nature« does it relate to the »Christian view of life« and Christianity, which historically »has transformed the world.«[36] But Savigny's thought is based on a secular concept of law, and because of this, his foundation of law retained its ability to remain relevant for a secularizing society. He had understood the profoundness of the transformation of 1789/1815 and provided an answer in the form of a consistent historicism. It was able to proof itself even in the context of such delicate matter as marriage and divorce law: when Savigny, in his role as minister for legislation, was tasked by the king in 1842 to create reform legislation on the basis of principles of Christianity, he responded with draft on a strictly secular basis, balancing morality with law, individual liberty with the institution of marriage.[37] Savigny was able to retain his cultural-historical approach he expressed in his much earlier pamphlet, throughout his life and while carrying the responsibility of being a state official, because that approach corresponded to the concept of law of a secular state in modernity. His theory of law founded in culture and history does not, therefore, bear an expiry date as some other Romantic tendencies in law, as in the realms of the theory of law and the state.

34 Savigny 1814, quoting Schelling, cited in Rückert (2012) col. 1050.
35 Haferkamp (2004).
36 As quoted in Rückert (1984) 366, citing Savigny, System, vol. 1, 53–55.
37 Dilcher (1984b) 336–339.

4. *Germanist History of Law as Scientific Program and Constitutional Responsibility: The Path to the St. Paul's Church (Paulskirche) 1848*

The Romanists (in short: from Savigny to Puchta to Windscheid) were able to work consistently on the development of a civil law for the new civic society, a society of the free and equal, on the basis of Roman law. They pursued an attendant political program, namely, to develop a civil law for a society conceived to be liberal. At the same time they also pursued another objective in the program of liberalism, that is, the separation of state and society: a civil law, developed by scientists as a body of society, without the state, whose implementation was to be supervised in state courts employing scientifically-trained jurists. Romanists, however, did not place constitutional demands on the state, which was largely still dominated by monarchic-conservative thought. They assigned to the state, that is, public law, and not private law, the role of addressing the issue of social order (Savigny). In this regard they were, as has often been said, quietist; they represented, therefore, only a partial, divided liberalism. As we shall see, the Germanists were different.

With the two textbooks by Karl Friedrich Eichhorn, *Deutsche Staats- und Rechtsgeschichte* und *Deutsches Privatrecht*,[38] a foundation of the discipline had been laid, in terms of contents and method, and was recognized by Savigny, as head of the school. Yet Eichhorn relied more on the early historicism of the Göttingen school of a Pütter and Hugo than on the new approach of Savigny, which recognized the social transformations and new developments of the time.

The Germanists, on the other hand, were confronted with heterogeneous texts, the particular sources of law of the early Germanic leges, the Survey of Saxon Law (*Sachsenspiegel*), the town laws up to the modern territorial laws, which made for a subject matter that was difficult to approach methodologically. Historical lectures on constitutional and legal history always included them when addressing public law, and Germanists joined with historians and political scientists to develop a »politically oriented constitutional history« (E.-W. Böckenförde). Even if certain historical texts as the foundations of public law, especially the so-called basic laws of the empire (*Reichsgrundgesetze*), had lost their relevance with the demise of the old empire, in this way the Germanists remained associated with public law historically and via the constitutional movement in the pre-March period.[39] Beginning with Eichhorn, they held constitutional lectures and engaged with the political and legal-political issues at the time, being associated with the public lawyers in a more narrow sense of the word, as well as with historians and political scientists. The zenith of such confrontations came with the Hanover constitutional conflict, the *Germanistentage* (Germanists' meetings) in 1846/1847, and the Parliament of the St. Paul's Church in 1848. This constituted a significant difference to the Romanists.

The breadth of texts as sources of law and the understanding of the issues was one thing that had to impact the mentality of the Germanists. It led to the inclusion of economic, social and political contexts in legal work, from peasant *Weistümer* to urban statutes to feudal law and constitutional documents, to the consideration of economic, social, and political context in legal work. Thus, while the program of the school provided for a broad historical view among the Germanists, such a view was also necessitated methodologically by the character of their legal sources.[40] The provisions for the Romanists were different. For them, the program of the school, too, required a cultural historical analysis, for explaining the uniqueness of Roman law. But this task could be approached as a specialty of law in Antiquity. For research on the Code of Justinian and especially for its transformation into a system of »modern Roman law« its cultural-historical aspects were of very limited relevance; the analysis of historical texts had a much bigger significance; it led to a critical edition

38 Eichhorn (1808–1823). Eichhorn (1823).

39 As late as in the 1890s Max Weber, with his venia legendi for Roman law and commercial law, was considered for a professorship that also included public law, on account of his qualification as a Germanist, by the Prussian Ministry of Culture. See Dilcher (2007); more detailed in the Introduction to Max Weber, Handelsgesellschaften, MWG I, 1, Dilcher (2008).

40 See Dilcher (1984a).

of the Corpus iuris civilis and further developed into an excessive critique of interpolations.

For a long time it was Savigny alone who tasked himself to trace the development further in medieval law in his *Geschichte des Römischen Rechts im Mittelalter*; its full expansion to a science of ius commune did not happen before the mid-twentieth century, starting in, above all, Italy (Francesco Calasso). Canon law, in fact part of the ius commune, for a long time played a special role in the realm of the Church, but not as a constitutive part of the European legal tradition. Dutch scholarship in particular analyzed the further development of the Usus modernus as a link to Pandectism, having been important for this area in law.

Different provisions led the two branches of the Historical School of Law develop along different paths in terms of subject matter, methods, and political philosophy from the founding of the school to the mid-century, but not to a basic opposition between them.

The Germanists[41] were confronted with different problems in law, in part caused by the change from an estate-based society resulting from the liberation of the peasants. Germanists could attempt to solve such problems in the application of particular rights suitable to the time. The approach to construct a »common German private law,« in competition to Roman law, transcended this activity. For this construction to occur the Germanists had to develop, in parallel to Savigny's system, general concepts and normative rules from individual particular sets of rules, without having recourse to a suitable and homogenous body of material that had been scientifically prepared, as was the case with the Justinian Institutions and Digest. For the Germanists there was a bigger gap than for the Romanists between comprehension of the historical material and its preparation in order to apply it in current times. We will attempt to thematize this development later as an attempt at further rationalization.

Early on, and then increasingly so in the second part of the century, current problems that did not find a proper place in the Pandectists' systematization were taken up and addressed, using Germanist texts and their approaches to arrive at a solution. A major area for such activities was commercial law and property law, but also individual rights as the basis of intellectual property law and the law governing inventions. In this area and in other areas that were outside of Pandectism's textual sources and its systematics, Germanists were able to develop areas of law that were highly relevant to modern economic society. The Historical School's ability to bridge the gap between realm of experience and expectations of the future (Koselleck), and the ability of the systematic approach to develop general principles of law from individual rules, made it possible for them to use medieval sources as the foundation for the creation of law.

More important for how the Germanists came to see themselves were attempts in monographs to delineate essential features in Germanic-German law that differed from those in Roman law: norms, methods, and concepts. Especially important is the book on *Gewere als Grundlage des älteren deutschen Sachenrechts* published in 1828 by Wilhelm Eduard Albrecht (1800-1876), a student of Eichhorn and Savigny. It was generally seen, including by Savigny himself, as a Germanist parallel study to Savigny's *Recht des Besitzes*. The concept of *Gewere* as a »mantle of property law,« given older German law's lack of an abstract concept of rights in rem, has retained its central status within the Germanist legal history until the present day. Thus property law in general, and real estate law in particular, were areas in which Germanists were particularly competent.

Albrecht had diagnosed a fundamental transformation for the realm of public law as well, in a »epochal way«[42] via his critical review of a book by Maurenbrecher, which rested on a private-law, patrimonial frame of reference. In his review, Albrecht defined the modern state as a separate corporation under public law and as a legal entity separate from the ruler of the state. He expressed such a view in 1837 during the Hanover constitutional conflict, and in 1850 during such a conflict in Saxony. As a representative in the Parliament of

41 Regarding the individual jurists mentioned here, the overview by Kleinheyer / Schröder (2008) provides the most important information about life, work, and literature.

42 Stolleis (1992) 91.

the St. Paul's Church he was further involved in the draft of the constitution. Thereafter he worked on developing a methodology of German law in teaching and, apart from his teaching, became a member of Parliament in the Upper House of the Saxon Diet in 1869. His activities as a legal scholar as well as a politician attest to the reach of Germanist legal science, driven by a liberal historicism open to modernity. Only recently has a scientific biography paid tribute to him.[43]

In earlier essays we have traced the above tendencies of the Historical School of law in different areas by reference to Savigny's student Jacob Grimm and his personal and scientific biography.[44] Grimm's path toward philology, next to mythology and folklore, reflects his personal predilections, but it also follows trajectories inherent in Savigny's program. Grimm remained a legal historian, in spite of his declared turn away from law. With the idea that poetry and law arose from the same origin he found a deeply Romantic metaphor for the relationship between law and language: the two arise jointly as a collective product of the pristine culture of a people. His series of essays, a large collective of *Weistümer*, and especially his *Deutsche Rechtsalterthümer* represent foundational scholarship in this area. His approach did not emphasize the notion of evolution but rather inner connections in the simultaneousness of a static order, which he knows how to gather and assemble into a world view that is strange and different to us. His textual hermeneutics he expressed in a Romantic metaphor: »our good predecessors give us a solemn look.« In this perspective he fulfilled what Romanticism had commissioned science with, and he expressed and depicts with clarity what medievalists today call the »alterity« of the Middle Ages.

At the same time Grimm relates to ideas in comparative ethnology when he points to cultural parallels between Germanic and Slavic people, and even Indians in North America. Grimm's *Rechtsalterthümer* thus represent the most far-reaching attempt to understand archaic law in Antiquity based on its own presupposition, and to give structure to this law analytically.[45] The other, Roman-law and scholarly tradition of the Middle Ages, he knew to be in good hands with Savigny. In contrast to the Germanist literary genre of »German private law,« in Grimm's work the core ideas and principles of the old law are not placed in service of the application of law, and thus too distorted to be adequately understood historically. Rather, these ideas and principles are seen as source of historical insight and in this regard are unsurpassed; they are rendered in »unblinded splendor,« as legal historian Wilhelm Ebel put it, using Grimm's own formulation.

A close look at the structure of the *Rechtsalterthümer* in particular reveals that this previously »unattempted kind« of analysis has not been recognized properly in legal research until recently, and even then more often in regard to particular aspects than the whole. Grimm begins his introduction with a view toward other forms of the old law, especially in the realm of language, such as in binomials, hendiatris, and alliterations, and he continues on to formulas, dimensions, and numbers, and then turns to symbols and rituals as expressions of more »sensuous« and less conceptual legal culture. Following older concepts in law, the main parts are divided into estate, *Haus*, *Eigen*, *Gedinge* (contracts), crime, and finally justice. – Only the most recent historical and legal-historical scholarship has managed to address the basic elements in his old legal and constitutional thought anew, but a new comprehensive concept, capable of replacing Grimm's, has not been found.

The subject matter that jurists were confronted with made it impossible for them to take flight into Romanticism, as such subject matter demands a steady engagement with conflicts in society. Even though Grimm wrote a moving letter to his teacher Savigny in which he bid farewell to law and its ties to reality in favor of a pure historical science, he did engage with political challenges and realities at various turns during his life. The first time this happened was during a protest against the suspension of the Hanover constitution in 1837 by King Ernst August, the case of the famous Göttingen Seven.[46] The protest, and the firings that follow, energized the German *Bürgertum* at a time of restoration and late-Absolutist repression of the liberal movement. Jacob Grimm's statement of

43 Borsdorff (1993).
44 See Dilcher (1985) and (1988a).
45 Grimm (1828).
46 On this Dilcher (see note 44).

protest shows how far he extended his argument into the realms of history, law, ethics, and legal theory, consistent with jurists, historians, and political scientists such as Albrecht, Dahlmann, Reyscher, and others. A novel approach in historical law as a science tied them together, and it positioned them in opposition to the representatives of a patrimonial continuity in regard to an estate-based society and Absolutism, as Albrecht had put it in his review. The protesters had recognized the novelty in the character of a constitutional state and derived their constitutional theories and their political and constitutional implications from it. Grimm himself emphasizes the constitutional oath and the question of consciousness; for him, law also includes justice.

After the turmoil concerning the Hanover protest and his release Grimm pursued a path toward an ever-increasing focus on his scientific work, especially on the German Dictionary, as a recluse. Yet the pre-March assemblies of Germanists 1846/1847, and his election as representative in the St. Paul's Church in 1848 summoned him to take on greater political responsibility. While he had assured Savigny in the Göttingen conflict that he would not be guided by a »false liberalism,« he now sat, even if a bit more to the right, next to his friend Ludwig Uhland, who had turned into an emphatic democrat. In retrospect one can see that Grimm, too, moved closer to this position. In the constitutional debate of the St. Paul's Church he formulated the most far-reaching postulate of liberty following the historical provision in law that »town air makes you free«: »All Germans are free, and German soil does not tolerate servitude. Alien serfs who reside on it are liberated by it.« But he objected to having his concept of liberty understood in the context of the revolutionary trinity as equality and fraternity, for fraternity remained a religious concept to him. A rejection of the French, Enlightened model remained in effect.

Jacob Grimm, who within the Historical School of Law was the Germanist most influenced by Romanticism, therefore engages, with steadiness and courage, with the political issues of his time, on the basis of his patriotically colored historical knowledge. This does not lead him to break with Savigny, the secretary in Prussia's service, Romanist, civil law specialist, and political conservative, but to a certain distancing, and even alienation, from him. Grimm derives his convictions from the German, the Germanic history of law, and his pathos of a liberal patriotism. For him, Romanticism is not only an impulse of a new concept of science that took over new perspectives and realms of thought, but a motivation to become actively engaged in politics, especially when the rulers offend his sense of justice. The Romantic worldview is concomitant with a strong realism in the assessment of foundational legal issues as they relate to politics. The same realism is evident in the use and interpretation of sources and historical social conditions, as they pertain, for example, to the issues of the role of women and the family in Grimm's essay on marriage by capture, sexual violence, and coercion.

As has been mentioned, Jacob Grimm sat next to his friend, the poet and jurist Ludwig Uhland, in the St. Paul's Church parliament. In an earlier constitutional conflict Uhland had taken a position with a poem.[47] In the years of transformation between the end of the old empire and the new constitutionalism a major issue was whether the prince, having ascended to new suzerainty, could decree a new constitution on his own, »impose« it, or whether he had to negotiate it, which would replace the venerable Tübingen compact of 1514 and long customary law tradition, with the existing diets. Having descended from a family of Wuerttemberg civil servants, Uhland clung to a traditional relationship between the prince and the people based on fidelity and covenant, that is, »traditional proven law« (»gutes altes Recht«), which he understood to mean a constitution agreed-upon with the estate representatives of the people. He adopted a similar tone in a tremendously popular poem »Herzog Ernst von Schwaben.« It amounted to a historicizing recourse to the history of the land as a means to legitimize civic aspirations. Uhland therefore adopts the view of a continuity to an estate-based constitution, with an anti-absolutist tendency. In so doing, he rejects the new approach of a constitutional state as a type of social order derived from reasoned decision-mak-

47 On this topic see Dilcher (1988b) (the relevant verses of the poem are provided there).

ing. That new view of Enlightened thought was presented in neighborly Baden by Karl von Rotteck in particular, in his *Lehrbuch des Vernunftrechts und der Staatswisssenschaften*, which was inspired by Rousseau and Kant, and together with Karl Th. Welcker in the tremendously influential *Staatslexikon*. The two books contain a renunciation of the Historical School deriving its legitimacy from history. Therefore, two schools of thought pertaining to the history of the constitution and constitutional law existed side by side but rested on different suppositions.[48]

The revolutionary aspirations of 1848, the constitutional debate, and the draft of a constitution of the St. Paul's Church and the failure of the creation of an empire based on the nation state marked a distinctive break for the German political *Bürgertum*, as it did for the Germanists who were involved. Interestingly enough, for the Romanists that was hardly the case. They felt little affected in their work designing a modern private law on the basis of Roman law, and saw themselves validated in the relevance of liberal private law apart from the issue of the constitution. They were able to continue their work on the basis of Savigny and Puchta. As we will see later on, they consistently pursued a path toward a conceptually and logically ever more exact methodology, oriented toward a positivistic view of science, which was their model. For the Germanists, on the other hand, the partial failure of their constitutional aspirations posed an increasing challenge after the middle of the century in terms of their ability to contribute productively to the creation of law – which was the aspiration of the Historical School of Law beyond the issue of legal matter and legal method. Given their historical sources of law and their presence in the traditional fields in law, their activities were oriented toward the full breadth of legal order, of constitutional and public law, and special issues of private late. From this position, the Germanists were willing use the »sword of legislation.«

The overall legal-historical design of the Germanists had moved little beyond the foundation laid by Friedrich Eichhorn in his *Deutsche Staats- und Rechtsgeschichte* and his *Deutsches Privatrecht*. These writings provided an account that continued to demonstrate its usefulness, as the various editions from the 1840s show,[49] and they conveyed a goal for national politics drawn from history. Eichhorn's perspective remained grounded, however, in an estate-based society. For these reasons, among others, he, who had been militarily involved in the wars of liberation himself, did not participate in the political-liberal activities of the Germanists. While accounts of public law, continuing the *Reichspublizistik* that had been superseded by events, in part in a historic-positivistic vein dealt with the law of the German Confederation, and in part were inspired by principles of natural law, jurists proceeding within the tradition of the Germanists were working mostly on current constitutional issues. These include the Hanover constitutional conflict, but also the constitutional issue in Schleswig-Holstein, which had remained acute over decades, and the politically sensitive ties of both states to the Danish crown, for which the absolutist lex regia was applicable. Georg Beseler, who had founded Germanism anew theoretically in his *Volksrecht und Juristenrecht* (1843),[50] had to leave the country because he refused to swear an oath of allegiance to the Danish king for the stated reason. Since the Germanists, given their textual sources and subject matter, always were at home in constitutional law, the order of the judiciary, and criminal law, they could not – and did not want to – withdraw from addressing current legal-political issues, ranging from constitutional limits to the ruler's power to the legal organization of jury courts and lay judges. Both the constitutional issues and the issue of lay participation in the courts they traced back to the basic question of the relationship between the people and the constitution, law, and the creation of law – an issue that had been raised by Savigny's legal theory, but

48 Stolleis (1992), 3rd chapter, especially 159 ff., 176 ff., in this matter distinguishes between rational-law liberalism and historical-organic liberalism. In contrast to our classification, he associates Romanticism more closely with conservatism and restauration.

49 Eichhorn's four-volume *Deutsche Staats- und Rechtsgeschichte* was published in its 5th edition in 1843/44, his *Einleitung in das deutsche Privatrecht*, also in its 5th edition, in 1845.

50 Beseler (1843). On Beseler see especially Kern (1982).

that Romanists, given the »specialists' doctrine,« did not need to take up, for they considered themselves legitimized by their legal culture to represent the people in matters of law.

Georg Beseler on one side and Puchta on the other pushed further the two realms of theoretical developments outlined by Savigny, bringing them into sharper relief and contrasting them. As a Germanist Beseler had reemphasized law's ties to the people and thus reembraced Romanticists' recourse to the past, that is, law founded on the spirit of people, and the principles and institutions that followed from it. On the other side Puchta emphasized that vulgar law and customary law developed by jurists were to be distinguished. As an example of the shaping of law Beseler developed his teaching on contracts of inheritance and, relating to Möser and Eichhorn, his emphasis on the communal character of the Germanic-German law. With the contents of this »vulgar law« properly described, Germanists were given the task, as found in Savigny's theory but also further described by Beseler, of retaining the connection between the development of German law and the spirit, morals, and traditions of the people. Similar to Albrecht in his *Gewere*, Beseler in his *Die Lehre von den Erbverträgen* had produced a major monograph on a Germanist topic, developed the concept of Genossenschaft beyond Möser and Albrecht, and prepared for further elaboration by his student Gierke. In contrast, Puchta took a position of strictly following the Romanists, pursuant to Savigny's »specialists' doctrine,« in increasingly arguing that customary law, as the foundation for the development of law, was a realm for the creation of law by jurists.[51] Thus Puchta became a major point of reference for Romanist science after Savigny, both in terms of its legal theory and its increasingly concept-driven legal methodology.[52]

This way the battle positions between Romanists and Germanists had been established, and the theory of the Germanists made possible an assessment of the reception of Roman law as »national misfortune,« whereas the Romanists were able to retain Savigny's developmental topos of the »inner necessity« of this reception and the status of the jurist as a conduit of the spirit of the people. But even the leading Germanists–from Georg Beseler to the Germanists' associations to Gierke and Brunner at the turn of the century–recognized the cultural and legal value of Roman law for Germany, whereas the Romanists accepted in principle the view that Germanic-German law contributed to private law. The picture of a continuous bitter fight between the two sister sciences »for every foot of ground,« which has often been presented, mispresents this relationship and, at best, has some validity for the conflicts preceding the St. Paul's Church and the formation of the Civil Law Code.

III. From the St. Paul's Church to the Turn of the Century

1. *Post Mid-Century: Realism as Study of Sources, Juristic Legal History, and Factor in National Politics: Heinrich Brunner and Georg von Below*

From the beginning, the Romanistic impulse of the Historical School of Law was counterbalanced by the ties between law and history as sciences and social relations, and it provided a level of groundedness and a check to becoming aloof from reality. The close relationship between both sciences and their sources provided for a solid positive foundation. Thus a strong methodological foundation was established in a positivist tradition with a strong connection to social and constitutional history and empirical reality, a foundation we have come to understand as realism in this tradition. The tradition engendered new editions of sources that set new scientific standards: on the Germanists' side the great national endeavor of the Monumenta Germaniae Historica, and on the Romanist side the critical edition of the Corpus Iuris and antique inscriptions headed by Theodor Mommsen.

A marked distinction between the two sister sciences was evident early on, in regard to their sources. The long legal tradition and the codification of Justinian that had shaped the source materially from an analytic point of view required a critique of sources, including research on interpo-

51 Puchta (1828).
52 On this, providing a differentiated assessment, see Haferkamp (2004).

lations and further scientific systematization. The particularistic nature of singular sources studied by the Germanists constituted a splintered entity, from the *Rechtsspiegel* to the city laws, and required the analysis of social-historical and constitutional contexts for its hermeneutic interpretation. Germanists were thus focused on identifying and analyzing sources, with strong empirical connections and not only normative ones, which constituted close ties to reality.[53] Many scholars have commented on the differences between these branches regarding the character of their sources, which had to lead to differences in scientific perspectives and methods.

In this context we will have a closer look at a leading Germanist of the second half of the century: Heinrich Brunner (1840–1915). A recent monograph depicts him as a representative of the new civic realism, which so demonstrably replaces Romanticism in the belletristic literature.[54] The classic writing by E.-W. Böckenförde, too, depicts Brunner with P. Roth, R. Sohm and the constitutional historian Georg von Below as belonging to a new epoch, the »transition from a politically-oriented history of the constitution to a ›juridical‹ history of law.«[55] Brunner may thus serve as an exemplar of the redirection of legal history toward a new realism. This will allow us to delimit its tension with Romanticism, which continued to have an impact and which we will recognize in Brunner's contemporary Otto Gierke.

As Johannes Liebrecht shows in his analysis, from his early years on the Viennese Heinrich Brunner sought to establish contact with academia in Berlin, which after the failure of the St. Paul's Church movement turned away from philosophical idealism and sought to reorient itself using the model of the French social sciences, particular Auguste Comte. Efforts to keep a distance to positivism of a west-European provenance led to a unique form of »ethical vulgar idealism, founded on national politics,« later labelled »real idealism,« among whose followers we can include the Ranke school of writing history.[56] In the background of this development German *bürgerlich* liberalism turned toward real politics, after recognizing in the ascending industrial proletariat a rival for political power and seeking a backing from conservative forces. On the other hand, liberalism also found that its central demand for political unity, together with a constitution that included constitutional guarantees and provided for political participation in the legislature, had been fulfilled with the founding of the German Reich under Bismarck.[57] This environment provided a new home for Brunner, who occupied a professorship after 1873 in Berlin.

In a series of important single-subject studies Heinrich Brunner turned to early medieval documents and thus made available to researchers a type of source, next to normative ones, that was close to social reality. This led him, as a Germanist, to make the influential discovery of Roman »vulgar law,« which was taken up by Ludwig Mitteis and Ernst Levy. It became an important area of research for Romanists, and one that expanded their field of study. Above all, he composed his *Deutsche Rechtsgeschichte*, a foundational writing to this very day.[58] It address Germanic times in volume 1, and the time of the Franks in volume 2. He does not extend the time frame of these studies into the Middle Ages or even the modern era. Still, his studies retain a prominent role, and they sufficed, both for his academic contemporaries and himself, as the foundation of a »German« history of law. This reveals a continuation of a Romanticist basic idea, which discovers essential elements present in initial conditions, the original effects of the spirit of the people. In his history of the empire of the Franks Brunner was also able to depict, however, in a »real political« vein, the unification of Germanic tribes into an empire, and its further development into a European entity with imperial coronation, in an exemplary fashion. The accent on national politics is unmistakable in Brunner, who as early as during his time in Vienna had an orientation toward German nationalism, and who then felt part of the Prussian German Berlin of the time of the founding of the German Reich. His liberal, rights-oriented and not conservative tendencies are evident in the fact that he viewed feudalism (whose late forms still had presented themselves to him) not as anchored in Germanic law; rather, he saw a consideration of the liberty for the people as being

53 See Dilcher (1984a).
54 Liebrecht (2014).
55 Böckenförde (1995).
56 Liebrecht (2014) 85, 84, 88 note 51.
57 Liebrecht (2014) 87.
58 Brunner (1906) and (1928).

intrinsic to it. In his account Brunner neutralizes a constitutional politicization by using contemporary positivistic legal science and its standards of classification as well as its legal concepts as the basis of his writing.[59] To him, legal and constitutional history »has entered the array of legal disciplines,« and it thereby had a solid methodological foundation.

With his methodological approach, solid command of sources, critical examination of text, and a »new level of mastery of the materials,«[60] Brunner emerged as an internationally recognized titan of his discipline who also had an impact on the study of legal history in France and England.

Romantic elements of the Historical School of Law are still present in Brunner's work, but they are secondary to a historical realism. In his writings, as in those of others in the Germanist camp, positivistic precision and an evolutionary thought shaped by contemporary natural and social sciences predominate. Remaining elements of idealist philosophy and metaphysics are suppressed into the realm of an ideological undercurrent, which Liebrecht appropriately terms »realist idealism.«[61] Such elements include the »religion of history« founded by von Ranke, a result of the suppression of religious ideas still present in Romanticism in favor of a historicism not yet fully thought out. It allows legal-historical Germanist studies – as was the case for other historical sciences – to become available for functions of national politics. This characteristic enabled »German science« to become a constitutional factor of the German Empire (Pierangelo Schiera). Viewed from a positive angle, »German science« emerged as a force contributing to the identity of citizenship, and becoming a factor in »nation building.« These lines of development become apparent in historical novels. Apart from Gustav Freytag the influential legal and constitutional historian Felix Dahn ought to be mentioned in this context. Dahn not only provided an extensive piece of scholarship in *Die Könige der Germanen*, but also penned a Germanic *Schicksalsroman* situated in the world of late Antiquity, *Ein Kampf um Rom*, and gave public lectures shaping public opinion.

With the Prussian constitutional historian Treitschke aggressive and anti-Semitic elements emerged from the substratum of historical-national thought. Otherwise the end of the century and the time around 1900 was a period of intensified international relations between the historically oriented scientific disciplines in Germany and those abroad. Not before a threatening situation manifested itself in World War I did academic elites dwell in an emotional climate of extreme nationalism and aggression, as can be seen in the »Seeberg address« with its excessive war objectives of annexation and hegemony after the »Siegfrieden,« whereas moderate voices remained in the minority.[62] With peace of Versailles this development, in its transmutation into the »legend of the stab in the back,« became a major liability in the Weimar Republic.

Heinrich Brunner (d. 1915) did not live to see this. For him, the national-romantic tendencies were fruitfully applied to the breadth of this Germanic-Franconian area of scholarship. They were fruitful in part due to the temporal limitation and, as a consequence of this limitation, the intensification of research. He profited at least implicitly »from the still extraordinary broad and fruitful frame of reference that the Historical School provided as a whole.«[63] In this way he emerged as the »architect« of an exemplary legal-historical structure of thought. Together with the highly significant textbook of his contemporary Richard Schröder,[64] his *Deutsche Rechtsgeschichte* constituted a major overview of his discipline, on which others then drew. In recognizing the positivist-realist system of thought the structuring notion of a liberal constitutional system of law, the »new constitutional history« later attempted to paint a different, more appropriate picture of medieval law.[65] Below we shall turn to such approaches (III. 3), which beyond realism continued in the Romanticist tradition.

If we wish to contrast the Romanticist tradition from a realist-positivist one, then we have to turn to at least one other aspect of Brunner's scholarship. As noted above, he pursued a »juristic« history of law by basing his depiction of Germanic

59 Both Liebrecht (2014) and Böckenförde (1995) point this out.
60 Liebrecht (2014) 96.
61 Liebrecht (2014) 270.
62 Winkler (2000).
63 Liebrecht (2014) 269.
64 Schröder (1889).
65 Brunner (1939); on this Böckenförde (1995).

and Franconian law on the concepts and system of contemporary legal science, including its concept of the state. He proceeded in a positivistic manner in the precise sense of the term: he views the positive facticity represented in this case by the sources as a given, which explains itself in the context provided. It is therefore not necessary to develop an understanding in a historic-hermeneutic sense, but the facts can be categorized within the system of present knowledge and thereby be interpreted and explained. In this particular manner legal and constitutional history can »be placed within the array of legal disciplines.« This thought precluded an apprehension of the alterity of the Middle Ages and its law, which Grimm in particular had once sought passionately, and Albrecht and Beseler had tried to achieve as well. Böckenförde[66] has emphasized that, on the other hand, »within this framework the individual case study is possible once more without constraint,« and such case studies, particularly in the area of regional history, led to a questioning of the model of social order and conceptual framework focused on the state. Yet a contribution of medieval history of law to a general scholarly account of law and culture was made impossible. What scholarship in our times concerns itself with under the rubrics orality and legal custom, is not addressed at all. For Heinrich Brunner orality was merely, next to public proceedings and the principle of adversary procedure, a principle of Germanic legal procedure, but not an element of the concept of law itself.[67]

Böckenförde has analyzed this path more closely and named, apart from Heinrich Brunner, Paul Roth, Rudolph Sohm and the historian Georg von Below as proponents. In regard to the medieval concept of the state, Below in particular emerges in Böckenförde's depiction as a decisive opponent to the »Romantic« legal historian Otto Gierke. We will address him briefly here, and later address this topic in greater detail. However, it is not possible, given the constraints of space, to mention the many discriminating views of Below, which he advanced in regard to the configuration of sciences at the time (regarding the Enlightenment, Romanticism, and positivism, but also Kant, Max Weber and Ranke); we are able to highlight only a few issues here.

Below does not adopt the conceptual tools of constitutional history in a naïve-positivistic manner, but does so for deliberate hermeneutic reasons. That is to say, he adopted these tools as a historian's »knight's armor.« His historical research presents itself mainly as a continued political battle over the concept of the state. His intensions were to demonstrate the character of the political order in medieval Germany as a state, that is, the »German state in the Middle Ages.«[68] He addresses kingdom, feudalism, jurisdiction, sovereignty and cities, as well as estate order and monarchy, and ultimately the core constitutional issues of the German Empire of his time. The foci of Below's research and his value judgments reflect a preference for conservatism and against liberalism. Below not only opposed such liberal thinkers as the theologian Troeltsch, the social and cultural historian Karl Lamprecht, and the sociologist Simmel, but also, most importantly, his main rival Otto Gierke. For him, Gierke's theory of *Genossenschaft* reeks of republicanism. He correctly identifies a view of the Middle Ages based on the perspective of social structures as a negation of his concept of medieval statehood. As a major influence on his times, Below and his work fall outside the Historical School of Law's main lines of tradition in the sense in which they are presented here. In spite of holding representatives of »Romanticism« such as Savigny, Ranke, and Grimm in high regard, he vigorously combats the last major representative of the Romantic tradition, Otto Gierke, within the realm of science but also based on political views.

As a further example of the expansive »Romantic« enthusiasm when it came to scholarship, and a strong realist concentration on analysis sources, is the contribution of Felix Liebermann (1851–1925) in the form of the edition and analysis of the Anglo-Saxon laws.[69] As the son of a German-Jewish entrepreneur, and brother of a painter who became famous later on, Liebermann was sent to England to learn the trade of commerce and the cotton industry, but he returned having decided to study the medieval history of England. As a student of history he established contacts with

66 Böckenförde (1995) 202.
67 Brunner (1906–1928) vol. I, 252.
68 Below (1925). On v. Below see Oexle (1988).
69 On this recently Jurasinski et al. (eds.) (2010).

Georg Waitz, Heinrich Brunner, and Theodor Mommsen, became privy to the intended editions of the Monumenta (MGH), and then also had connections to the leading English legal historians F. W. Maitland and W. Stubbs. His editions and commentaries have offered, until the present day, a new way of understanding Anglo-Saxon law based on a critical reading of the texts.[70] Both he and English legal historians saw common Germanic foundations of the English and German constitutional and legal history, and this view sustained their connections and Liebermann's writings. Liebermann was highly regarded as a private scholar lauded with academic honors, in both Great Britain and Germany. World War I, with its rupture and negative consequences, cast a dark shadow over these connections, for when Liebermann wrote a note to Emperor Wilhelm II supporting the German fight for international supremacy in nationalist tones, his relations to English colleagues after the war were compromised. Anti-Semitism during National Socialism brought forth attempts to extinguish his name from science in Germany, and a re-establishment of lost traditions proved difficult. It is only today that English, American, and international research has begun to rediscover Liebermann and to build on his work. This allows for a new discussion of the liberal »Whig-interpretation« of a continuity of Anglo-Saxon and Anglo-Norman history in regard to common law and parliamentarianism.[71]

2. *Positivism and Jurisprudence of Concepts (*Begriffsjurisprudenz*) as Modernization of the Rule of Law in Pandectism and German Private Law: The Rationalization of Law in Max Weber's Analysis*

For the third perspective toward the history of legal science in the 19th century we have chosen the concept of rationalization. As we have seen, Savigny had curtailed the absolutization of the Romantic teaching of the spirit of the people by pointing to the transtemporal rationality of Roman law and thus assigned the most important position to the profession of the jurist. This type of rationality was based on the notion that *theory* should completely permeate *practice*, the development of legal *forms*, constituting a type of *grammar of law*, that is, development of concepts capable of making the work of the jurist so reliable as if he or she were *calculating with concepts*. The scientific aspects of law are therefore separated as a technical element, which is positioned next to a political element that remained tied to people's lives.[72]

In the text of 1814 elements of conceptuality, of methodological-logical precision, and of the notion of a system, which constitute the foundation of Savigny's major legal writing, are contrasted with the Romantic approach of a tendency toward unity, of a transgression of boundaries, and of a connection with common consciousness, as we have seen above. In Savigny's legal writings his linguistic prowess allowed the organic character of institutions and consideration of different aspects still to bring together all these conflicting elements; the underlying philosophy of objective idealism (Rückert) was able to reconcile these differences as well. With his student Puchta a methodological development began, at first only in Romanist Pandectism, that increasingly emphasized the above-mentioned rationalist elements of his methodology, and ended in absolutizing them. Later this trend was described as legal positivism and jurisprudence of concepts. Puchta's student Rudolph von Jhering initially in his early writings developed this further as »natural-historical method« following models of the formation of systems in the natural sciences, but criticizes them after his »conversion« sharply with bitter sarcasm (»canopy of concepts«) and thus introduces a negative connotation to the term jurisprudence of concepts.[73]

His turn toward a »purpose in law« had stimulating effects on newer branches of the German and international science of law, such as the German Free Law school, the jurisprudence of interests, the sociological school of criminal law, and sociologically-oriented law in general. Pandectism in itself continued relatively unchallenged, up to Windscheid's seminal textbook and its decisive

70 See Fruscione (2010).

71 This has recently been pointed out in Roach (2013).

72 The parts in cursive are taken from the classic text of Savigny's *Beruf* on the pages indicated in note 22 above.

73 The general discussion on Jhering cannot be addressed here. Some perspectives are depicted clearly in the discussion in Behrends (ed.) (1993).

impact on the German Civil Law Code, along its path of shaping law by creating a conceptual system, that is, theory. Windscheid himself played an important role, including in his function of being a member of the commission working on the first draft of the Civil Law Code. This enabled critics to label this code a »Pandectist textbook cast in paragraphs« (Gierke). The impact of Germanist criticism, led by Gierke, as well as of socialist criticism, however, remained limited to scholarly publications, and to associations engaged in social policy and their meetings, such as the German Lawyers Conference (*Deutscher Juristentag*), the *Verein für Socialpolitik* and the *Evangelisch-soziale Kongress*.

We can see how in the second part of the century two opposing groups formed against the main branch of Pandectism. First, there was criticism, above all presented by the Romanist Jhering, toward a jurisprudence of concepts that withdrew into a state of legal-scientific autonomy. This view was directed toward the social purposes of law and the fight about the law, and it provided a basis for impulses in the German Free Law school, the jurisprudence of interests, and the sociological jurisprudence, supported by Romanists as well as practioners. Second, on the side of the Germanists Otto Gierke in particular sharpened his criticism toward Pandectism leading up to the formation of the Civil Law Code by pointing to a lacking connection to the populace both in terms of language and content among the Pandectists, given their fully-fledged conceptuality and lack of consideration of social issues. He opposed it by reference to the tradition of Germanic-German law and using the slogan »German law is social law.« Franz Wieacker used these positions as the foundation of his grand narrative about the development of law and jurist into the 20th century.[74] In his writing the German Civil Law Code of 1900 with its basis in Pandectism is depicted in an often-cited slogan as »late-born child of liberalism.«

A series of new legal-historical analyses question these two lines of attack against Pandectism and attempt to revise Wieacker's depiction. The examples of the two most important exponents of Pandectism in the first and second parts of the century, that is, Georg Puchta und Bernhard Windscheid, have been used to question the impact of a »jurisprudence of concepts« on them.[75] This goes as far as a major scholar recently asking, in passing, whether the so-called jurisprudence of concepts »existed at all other than in an exaggerated joke article and a few examples given by Jhering.«[76] Yet a detailed newer analysis shows the complexity of the social issue as a challenge for private law and the response by the Civil Law Code. In any case, the liberal task of safeguarding liberty in private law was a central concern especially for Pandectists and their influence on the Civil Law Code.[77]

It is important for us to recognize an issue that emerges from the engagement with these points of view but does not center on them: namely, the issue how the rationalist aspects in Savigny's foundation of the Historical School was continued and elaborated upon in parts of German legal science in the second part of the century, which then was criticized as »jurisprudence of concepts,« and how, in turn, this critique elicited responses from scholars who stood in the tradition of the schools. The counter-positions included those of Otto Gierke, a Germanist who took up the topos of the people, and thus a Romantic viewpoint. We will address it separately below. Yet this is not the place to discuss these newer perspectives in the light of current scholarship. Rather, the issue will be addressed in the context of the analyses by the legal scholar and sociologist Max Weber, on whose rationalization paradigm we have established our discussion before when addressing the view opposite from the Romanticists'. This will allow us to prioritize Weber's view over the ones in current scholarship, for the profundity of his analysis supersedes current efforts. No one but Franz Wieacker recognized the importance of Weber's positions and used them as a background to his own overall presentation.[78] He afforded Weber's concept of formalism a prominent role, which has resulted in a broader reception of it internationally.[79] The context and foundation of Weber's analysis will be presented first.

Max Weber studied law from 1882 to 1886 in Heidelberg, Berlin, Göttingen, and for a brief

74 From a perspective looking backward in time Rückert (1995).

75 This might be an adequate summary of the writings by authors ranging from Falk to Windscheid, from Haferkamp to Puchta, and the relevant essays by Rückert.

76 Rückert (2015) 20.

77 Hofer (2001).

78 Dilcher (2010).

79 See, for example, scholars such as Negri, G. Vincén, and Porzio; on this issue Wieacker (1967) 431 note 3, 368 note 68, 353 note 13.

period also in Strassbourg. He obtained his doctorate in Berlin in 1889 and pursued a Habilitation in the areas of commercial law and Roman law, that is, in the tradition of the Historical School of Law, in civil law applicable at the time.[80] Subsequently the Prussian Ministry of Culture considered him not only for an appointment in these areas, but also in public law as well as the history of German law. While Weber then turned toward economics and sociology (he is considered one of the founding fathers), he was courted after World War I to seek an appointment in the law school of the University of Bonn by that university and the Prussian Ministry of Culture. There is certainly no reason to question his competency to analyze the status of legal science as it existed then.

Beyond this Weber had close contact to major theorists of law due to family-related friendships during his studies, and he was able to gain an overview of the entire discipline. As a student, though he found Roman legal history more interesting that the systematic lectures of the renowned Pandectist Immanuel Bekker, he was introduced to the subject matter of German law in the Middle Ages in a thorough manner by a friend of his father, the legal Germanist Ferdinand Frensdorff in Göttingen. However, given the greater importance of Roman law, Weber did not pursue a dissertation in this field. He chose as his teacher and Doktorvater the scholar of commercial law Levin Goldschmidt rather than a classic Romanist. Goldschmidt had analyzed the subject matter of commercial law from their medieval Mediterranean origins, that is, mostly from the perspective of the ius commune in Roman law. This was the starting point for Max Weber's dissertation on the history of commercial partnerships in the Middle Ages. However, Weber also fully incorporated in his accounts Germanic-*genossenschaftlich* elements from the point of view of his other teacher at Berlin, Otto Gierke, who was also the second reviewer of his dissertation. In regard to a crucial issue for the historical development of commercial partnerships, Weber decided to go against Goldschmidt and embrace a *genossenschaftlich* perspective in arguing that these partnerships developed internally in Germanistic way out of a *Genossenschaft* of family and labor rather than in a Romanist-individualist way out of representations toward third parties.[81] Weber thus decided for a more social-historically based and against a constructive-legal approach. Both he and Goldschmidt insisted on their controversial points of view. Weber therefore knew what he was writing about when he dealt with differences in contemporary law as a science. In 1895, at a time of the struggle over the creation of the German Civil Code between the Romanist-Pandectist approach and the Germanic-traditional, social approach, he himself had written an essay for a larger public. In the essay, he took a critical view toward both schools and their differences, and toward the consequence of these differences for law and politics.[82] In his *Habilitation* thesis on Roman law he addressed agrarian property relations not in regard to their civil law aspect, but by composing a picture of an agrarian order developing elements of an ancient form of capitalism. In this way he clearly crossed the boundary to Pandectism at the time.[83]

Weber developed a comprehensive compendium of law in a text, probably written around 1914, that is included in his posthumous publication *Economy and Society* and become known as his »Sociology of Law.«[84] Weber had the full perspective of an informed jurist, but also the distance of a social scientist who was oriented toward empirical analysis rather than normative results. He applied his explanatory paradigm of »rationalization« not only to the development of law in the Occident since the Romans generally, but specifically to German legal science of the 19th century. From a comparative perspective he looked toward France on the one side and toward England on the other. Considering the many misunderstandings in regard to Weber's methodology, we wish to emphasize that the concept of rationalization is an ideal type and relates to a historical development. That is to say, it is a concept constructed on the basis of an exaggeration of empirical observations and used for the precise analysis or assessment of reality, even

80 For the following, with additional references, see Dilcher (2007).
81 Dilcher (2007).
82 Weber (1895).
83 Capogrossi-Colognesi (2004). Cf. Deininger (1986).
84 Weber (1972). Critical edition: Weber (2010).

by falsification. It is never meant to be a one-to-one description of reality.

It is not the place here to present the extensive system of Weber's writings on law. But it is important to us to point out the significant role Weber attributes to formal aspects of law. These formal aspects are intimately tied to different types of rationality in law, and thus to the issue »in which of several possible courses legal thinking takes toward rationalization.«[85] »The peculiarly professional, legalistic, and abstract approach to law in the modern sense is possible only in the measure that the law is formal in character« (397). With the increase in abstraction rationalization aims at sublimation, but sublimation builds upon the formal character of law.

This rationalization is geared toward generalization in the form of the creation of abstract legal propositions. Generalization occurs within a tense relationship between analysis and synthetic construction. The latter can be pushed toward systematization and what is conceived to be a complete and total system of rules. »Current-day civil doctrine« (431), according to Weber, has achieved the highest measure of such a methodological-logical rationality.

In two passages Weber takes on current issues in law and legal science in regard to the formal qualities and extent of rationalization: in the section mentioned above, which are in the introductory sections of his sociology of law (395-397), and the other one in another section, where he takes up the theme of rationalization and its connection with formal characteristics in regard to modern law (495, 504-513). In this context he makes an assessment about the significance of the Historical School of Law, which he addresses mostly by using other terms: »jurists professionally trained in historical matters,« »historical jurists,« »rule of historians,« occasionally the »methodology of Pandectists,« and finally the »Germanist camp of the Historical School of Law.« Ultimately Weber's assessment is astoundingly negative: even though he concedes »a development of legal historiography never achieved in any other country,« when it came to the unification of the private law the German jurists »after seven decades of supremacy of historians« »approached the undertaking reluctantly and not fully prepared« (495). It becomes apparent that for Weber the predominance of the Historical School with its two branches Romanism-Pandectism and Germanist scholarship extends over the entire century up to the codification of the German Civil Code.

How is it possible that Weber, who as a young lawyer was fully immersed in this development, looking back in 1914, after the codification had been successfully completed and the civil-law codification had already been in effect, comes to such a negative conclusion? We will have a look at his theoretical discussion about the forms an extent of rationalization and the orientation of law guided by formal of substantive principles. For Weber classic Roman law showed its rationality rather as an empirical art form, by virtue of the fact that legal argumentation was closely tied to case law. In this regard Anglo-Saxon law is similar to it to the present day (509 f.), as both were created by practitioners of law with scientific training, so that the results of their legal activities remained in a proper relation to practical demands on the law (reminding us of Savigny's point regarding the relationship between theory and practice). Practical demands derived from the reality of practical concerns. But these concerns, Weber argued, were shaped by the irrationality of the factual, and thus were not easily integrated into the process of rationalization of law. In contrast, medieval and modern law as a science, carried out by scholars, pushed along abstraction by developing legal principles, as a logical formalization of law. Yet the Usus modernus Pandectarum, Weber noted, still recognized the difference in needs when it came to the legal interests of those involved. With the development of a »scientific historical purism« (495), that is, the Pandectism of the Historical School, the ties to modern legal practical concerns got lost once more. This opened up an avenue for abstract legal logic – that is, formation of concepts and systematization – entirely. »A purely logical re-systematization of the old law was, of course, not achieved by the historical jurist in any convincing way«

85 Weber (1972) 395. All citations that follow refer to this text. It is easy to find the corresponding pages in the critical edition of the MWG (see note 84).

(495), which is why all compendia of the Pandectists down to Windscheid's ultimate remained unfinished. The Germanists, on the other hand, Weber continues, were so interested in the irrational and a-formal elements of estate-based society that they too could not successfully develop a »strictly formal legal sublimation« of their subject matter (a topic we will take up shortly). On the Continent it was the subject matter of commercial law alone, which Weber had studied during his study of law, that was systematized by legal practitioners »without loss of adaptation to practice concern« both scientifically and then through codification.

Anglo-Saxon law – which is his term for English Common Law – was similar, he argued. Due to its development by practitioners on the basis of case law it was highly applicable in practice, though much less rationalized; given its dependence on the legal profession it meant a denial of access to the courts for those without adequate means (511). Overall, Weber noted, a lower degree of rationalization was not at all a disadvantage for the development of modern capitalism, which he saw as the result of calculated rationality on the basis of the Protestant ethic. Modern capitalism, he concluded, was therefore by no means predicated on the Occidental-Continental form of rationalization of law (509).

This clearly shows that for Weber rationalization, as an ideal type, was an analytic category, not a frame of reference, and especially not an »ideal.« Contrary to what some critics have often argued, he did not deprecate English law; he actually pointed out its superiority to Continental law in cases in which they stood in conflict, such as was the case in Canada (511). That it had not brought rationalization to a conclusion was actually an advantage. This topic remains current today in light of globalization. Weber is not an advocate for rationalization, but addresses its ambivalent aspects in specific conditions.

Now let us return to the topic of rationalization as it relates to the Historical School of Law. In its recourse to classic Roman law Weber sees a deepening of historical research, but also an elevation of the logical construct, the abstraction toward concepts at a higher level (using the examples, pointing to Savigny, of »legal transaction« and »declaration of will« (in MWG 582, 492),[86] and move toward ultimate principles of law, sublimation, and systematization. The attendant formalization of law – which, in different ways, could also occur at the more empirical level – increases the level of calculability and ostensibly is in the interest of civil commerce. But too often the results, compared with the expectations, are irrational: »the frequently made charge that the purely logical law is ›removed from life.‹«[87] Weber emphatically includes the categories of »expectation« and »life« into his analysis. For him, expectations are apparently »bundled« as a result of material demands (which are, to him, always opponents of formalization) being placed on law. These demands were placed on law from the working class, but they resonate among ideologists of law as the »pathos of ethical postulates« in the form of »justice« or »human dignity« (507). In such a way, he argued, the formalism of law, indispensable for a developing system of law, was questioned in its foundation. Weber views the entire process as »exaggerated rationalization as well as unconditional self-contemplation [in MWG: ›self-determination‹] of legal thought« based on Civil Law doctrine (507, MWG 631).

This led, he argued, to an up-swell of movements in Germany hostile to logic and history, similar to France. Among those movements he includes especially those who supported the »doctrine of free law« but also other legal doctrines concerning methods that derived from value-based decisions of judges in concrete case and not from a deduction within a seemingly complete and systematically closed body of law.[88] Weber perceives the existence of a broad contemporary movement that embraces new doctrines and opposes logical-rationalist and systematically conceptualized law, which he views as the end product of a long development associated with Roman law, but ends in the »exaggerated rationalization« of the Pandectists. In a dialectical development it created tendencies from within that stood in contradictions to

86 See also Weber, Recht, MWG (2010) 582.

87 Weber, Recht, MWG (2010) 583.

88 Lombardi-Vallauri (1971) also argued for an inner unity of the doctrine of free law and other parallel developments. On the doctrine of »Lückenlosigkeit« of law and the legal system Schröder (2012), especially 336 f.

it. Those tendencies were in part irrational and essentially antiformal. This was one of the typical reactions, he argued, against the rule of the professional specialist and rationalism (512), but also a fate, he notes at the end of his chapter in his sociology of law, that was unavoidable (513). – In this we can see the negative dialectic of the Enlightenment, and it reminds us of Weber's dark prediction of a »rigid cage of dependency« (Wahlrecht und Demokratie, 1917; 285/90) as the fate of modernity.

Given these considerations, what is relevant for an assessment of the impact the Historical School of Law had historically? In German Pandectism Weber sees the ultimate sublimation of a process of rationalization on the foundation of Roman law, and of law itself. Within the framework of his sociology of law (which itself is an outgrowth of the Historical School[89]) he views Pandectism as carrying certain aspects too far, such as its classification of law, the highly abstract nature of its concepts, the fiction of a system of law without gaps and the application of deductive logic, based on the formalization of law. The advantage of the utmost calculability of law is counterbalanced by the danger that a highly rationalized law is no longer pertinent to the irrationality of society, and, concomitantly, to the interests and expectations of those who participate in legal interactions; in this sense, it may assume a »quixotic« quality. This applies especially to social problems resulting from the emergence of a new class-based form of society. Weber considered commercial law a field that strikes the right balance throughout between the artful empirical application of law (as in Roman law and in English law) and the need for rationalization. The development of commercial law rests on legally trained practitioners, on lawyers and judges. The criterion established at the time by Savigny for Roman law, of linking practice and theory, applies to this new field. However, these remarks caution against the »destabilizing acceleration of rationalization« found in segments of his own school, as here practice recognizes the contingency of facts, whereas science abandons it in favor of theoretical sublimation.

These classifications and analyses are no longer present in the most recent discussions concerning the character and significance of the jurisprudence of concepts among German scholars – is this an indication of German legal history's lack of reception of Weber? It offers us a reason to turn back to Germanist studies, which was closer to the other tradition of the school, namely law's connection to the people and its embeddedness in historical-empirical social conditions. Given his historical-systematic writings and his criticism of the social blinders worn by Pandectist private law studies and of positivist constitutionalism's neglect to consider political implications of law, Otto von Gierke emerges as the starting point for such considerations.

3. *Spirit of the People, Law, and Social Reality: Otto von Gierke's Legal Theory of* Genossenschaft *and the Social Aspects of Law*

For Max Weber the rule of the »historical jurists,« as we have seen, distinguished into Pandectists and Germanists, extended up to the codification of the German Civil Law Code. While for him Romanist legal science ended with extreme rationalization and its partial transformation into the irrational, Germanist legal science took on position that was much less subject to continued rationalization because it remained rooted in the immanent irrationalisms of the old estate-based society. It followed a different path that reflects the continued influence of the Romanticist approach of the School. We will address this issue in the context of the scholarship of Otto von Gierke (1840-1921).[90] In the work of his student Max Weber we found criteria to analyze and categorize Gierke's scholarship more precisely, which is why the chronological order has been transposed here.

Looking back at his career in 1903 Gierke considered himself part of the Germanist tradition of the Historical School of Law.[91] An initial look at his scholarship shows to what extent Romanticism, realism, and rationalization have influenced it. Realism is present in his closeness to his sources and his steady consideration of social aspects of life from a legal perspective and his engagement in legal politics. Rationalism is present in his attempt

89 Dilcher (2007).
90 He was nobilized in 1904.
91 Gierke (1903).

to use concepts to understand history and to use principles derived from historical studies to inform the formation of doctrinal concepts. Above all, he represents Romanticism in continuing the Germanist tradition of deriving the law of the people from their entire history, including their customs, languages, manners, and conventions. The Romantic elements are evinced in the significance he attributes to the principle of *Genossenschaft* emanating from a spirit of the people unique to the Germanic peoples. Influenced in an obvious way by Hegel's philosophy of history, Gierke developed a dynamic view of history based on the dialectic relationship between unity and diversity, and between rule (*Herrschaft*) and co-operation (*Genossenschaft*), from the early days to the present time. His intellectual affiliation with Romanticism is also evident no just in his embrace of flowery and metaphorical prose especially in his lectures (best known among them the breath of a dream of freedom inspired by natural law and a drop of socialist oil for the future of public and private law),[92] and his writing on »humor in German law« evocative of Grimm, but also in an emotional connection to his scientific discipline and its basic values. This is evident in the fact that he accused the Germanist Gerber, who had applied Pandectist and conceptual jurisprudence methodology to German private law, of having killed »the German soul in German law« (just as Heinrich Brunner described his Germanist colleague Gerber as »undertaker of German institutions of law«). However, it should be noted here (an issue we will take up again later) that his occasional emotional-Germanic tint in his language and thought was a serious impediment to the reception of his insights in more recent time, and allowed him to be suspected of being close to National Socialist thought.[93] This is in contrast to the high esteem in which his work is held by modern historians (Oexle, Blickle), by international scholarship, and by individual jurists. The esteem derives from Gierke's comprehensive approach in his legal studies, to connect private and public law, the historical and the philosophical dimension, and law and society.[94]

The following remarks cannot and should not provide a complete and final assessment of Gierke, but they can show how central aspects of the Historical School of Law could be used to create a comprehensive scientific publication that is important until the present day. It is considered to be among the 150 most important publication in the history of law, and its author is considered next to Rudolph Sohm and Georg Jellinek to be among the intellectually most important German legal scholars of the German Empire.[95]

Otto Gierke was only one year younger than Heinrich Brunner and belongs to the same age group. Both found their scientific basis in the Historical School of Law. Yet Gierke's foundations were older than those of Brunner, who was a representative of a new realism. Gierke clearly continued in the legal tradition of his teacher Beseler.[96] Whereas Beseler later became a political representative in a realist-political vein later on, Gierke continued the national-Romanticist imprint on Germanist legal studies. The St. Paul's Church movement and its failure were among Gierke's most important experiences as a youth, and he recurred to it time and again, including in his lecture at an old age on the Germanist view of the state in 1919, after the lost World War and the breakdown of the German empire. An important experience of a national rapture for him was his participation in the German-French war and the founding of the empire; in the enthusiasm of the people at the time of the emperor's entrance into Berlin he believed to recognize the spirit of the people. Before that he composed his Habilitation thesis as the first volume of his *Genossenschaftsrecht* whose continuation would turn out to be his life's work.

Gierke's four-volume *Genossenschaftsrecht*, unfinished in the end, present a broadly-conceived application of the principles of the Historical School of Law. It is more than a monograph in

92 Expressed in his lecture in Vienna: Die soziale Aufgabe des Privatrechts, Gierke (1889). See further Dilcher (2016c).

93 References in Dilcher (2013b).

94 See the obituary by Gurwitsch (1922).

95 Landau (1995) 575.

96 This is evident in the dedication of volume 1 of the *Genossenschaftsrecht* to Georg Beseler.

one of the core areas of Germanist law. The first volume is a dynamically conceived historical overview from the time of the Germanic tribes to the present times. On this foundation the next volumes provide a treatment of the topic from different perspectives, in the form of monographs organized around issues of doctrinal history but with a deepened focus on the history of theory and ideas.[97] The contents of the volumes follow the scheme of dual compendia of the Historical School of Law: historical foundation on the one hand, and systematic analysis oriented toward problems and issues on the other. Gierke's main focus is on German law as the realization of the spirit of the German people. Equally important, however, are Roman law, and, lastly, church law as an element combining the cultural values of Christianity. He attributed to German law the basic value of liberty and cooperation (*Genossenschaft*), and to Roman law, unity and authority; Canon law during the Middle Ages includes both. To develop these themes clearly, Gierke dedicates volume two to the »German concept of association« (*Körperschaftsbegriff*), that is, the Germanist aspect, and volume three to »State and Corporation in Antiquity and the Middle Age and Their Reception in Germany,« and thus to the Romanist-ecclesiastical aspect. A fourth volume remains unfinished, and complemented by consideration of the book on Althusius, is devoted to the »State and Corporation in Modern Times,« addressing the study of natural law.[98]

The last two volumes in particular ensured Gierke's admiration by an international audience for having mastered vast amounts of materials, especially in the non-Germanic field, that is, Roman and Canon law as well as the political-theoretical and theological traditions of the Middle Ages and early modern times.

The law of the *Genossenschaft* remains Gierke's guiding topic and the foundation of his work. His elaborates on it in the areas of the law of corporations and associations, of private law in general, and of corporate law and legal philosophy. His elaborations contain not only a legal but also a social theory. To him this dual characteristic means a link between law and society, between normativity and factual conditions. He also provides an epistemological foundation, particularly in regard to the reality of the personality of associations, being cognizant of Kant's precept of distinguishing normativity from empirical reality, the *Sein* from the *Sollen*.

As a heuristic presupposition, which Georg Jellinek and Max Weber later would conceive to have a metaphysical foundation, Gierke recognizes basic principles to be at work in the social order. These are, as Otto Gerhard Oexle notes, polar tensions whose dialectic resolution constitutes the structure of a society.[99] The principles are, on the one hand, one of authority and thus political unity and organization, and, on the other hand, one of *Genossenschaft*, representing variety, individuality, and liberty. In a separate study we have demonstrated that the embeddedness of liberty in *Genossenschaft* does not equate to collectivism, but serves to ensure the realization of liberty in society vis-à-vis the state.[100] Characteristic for Gierke's scholarship, he works in an almost positivist manner using sources he carefully references for all of his areas of interest and all historical period, ensuring that these highly abstract principles and concepts do not lack in empirical references.

On the basis of the philosophy of German idealism, and thus a metaphysical approach, albeit one he critically reflected upon, Gierke develops a legal and social teaching out of an encompassing interpretation of history. In developing new syntheses from a dialectic method and focusing on the spirit it is certainly inspired by Hegel; however, Gierke also seems to have been familiar with, and had in mind, Karl Marx, as one might suspect in recognizing that in his writings law is embedded in economic and social structures, among other things, and he was critical of capitalism on the one hand, and fearful on the other hand of an anarchic, culture-destroying revolution of the proletariat stripped of its rights. The steady balancing of authority-based and *Genossenschaft*-based princi-

97 The clear structure of the Genossenschaftsrecht derived from the perspective of the Historical School of Law is misrepresented by Schäfer (2008) 496–499, when he diagnoses a »back-and-forth« in regard to methodology and structure.

98 Gierke (1880).

99 Oexle (1988).

100 See Dilcher (2016c).

ples serves to avoid such extremes, which he sees represented by both individualistic capitalism and collectivist state socialism. The intrinsic urge and the mental power to afford law a role that transcends the mundane and assumes a world-historical role is the legacy of an embeddedness of Romanticism in the founding of the Historical School of Law. Another type of embeddedness occurs in the world view of historicism, even though for Gierke it does not lead to a meandering into a »polytheism of values« (Ernst Troeltsch). On the contrary, the orientation toward national and European legal and cultural tradition leads to a clear set of values. This, too, is a legacy of Savigny.

This set of values is apparent in the area of private law and legal-political statements made in the development toward the German Civil Code when Gierke fights for the inclusion of Germanic law principles of law, with the motto »German law is social law.«[101] He posits this in confronting the Roman law of the Pandectists, which he sees as individualistic. Without a doubt this phrase contains ideology, as was recognized by Max Weber at the time.[102] It ended up ignominiously in the party program of the NSDAP.[103] For Gierke's argument it served a different purpose in the context of his legal politics, as he used it, in opposition to the Pandectists' conceptual apparatus that was inflexible and did not allow for alternatives, in order to open up the discourse toward a functionalist view of legal institutions and rules of law and their social impact.

He boils down this point of view to »German law,« being partially correct at best. He uses as examples the concept of property, such as in reference to the separation of chattel and real estate property, and its functions, from agricultural estates to premises in the city and ownership of condominiums, and to differences between exchange agreements and continuing obligations.[104] He emphasizes differences in the forms and functions of employment contracts up to and including industrial labor contracts. His work is path-breaking in the area of labor law, as he uses the notion of *Genossenschaft*-based legislation to advocate for the unfettered formation of labor unions and for the recognition of collective wage agreements, and in this way provides a foundation for his student Hugo Sinzheimer, a »father figure of German labor law,« and Sinzheimer's theoretical and practical activities.[105] In this contest, he, without a doubt, gives content to his term of »social law.« From the tradition of the St. Paul's Church and Germanist studies he is familiar with legal-political battles over the implementation of principles he considers valid and subsequently classifies as »rooted in Germanic law.« He wages this battle in lectures, publications, in associations such as the *Verein für Socialpolitik*, the German Lawyers Conference, and the *Evangelisch-soziale Kongress*. Favoring a participation in the battle over the inclusion of German law principles in the German Civil Law Code, he delays the continued development of his writings on the *Genossenschaftsrecht*, and he notices at the end that some progress had been made in terms of changes to the first draft of the German Civil Law Code, which had strong imprints of Romanist science and elements foreign to the people. A private law code such as the Eugen Huber's in Switzerland would have corresponded much more closely to his wishes.

The development of the civil law codification provided Gierke with the impulse to take on the task of writing a compendium of German private law, the old project of the Germanists, consisting of a systematic account of its material with a claim to universal validity. Parallel to the development of the German Civil Law Code he publishes three volumes, representing an incredible effort: a general part and on personal law in 1895, on the law of property in 1905, and on the law of obligations in 1917. A separate study on family law has recently been found among the papers of his estate and been published.[106] As is always the case, Gierke explains his intent precisely: considering the fact that German Civil Law Code reflects largely the

101 Pfeiffer-Munz (1979).
102 In Weber's short essay on Roman and German law, Weber (1895).
103 Article 19 of the NSDAP party program: »We demand that Roman law, which serves a materialist order of values, be replaced by a German common law.«
104 In his lecture »Die soziale Aufgabe des Privatrechts« (see note 90); later with doctrinal elaboration in *Deutsches Privatrecht*.
105 On Sinzheimer see Benöhr (1993).
106 Gierke (2010).

influence of Romanists, he was to explore the »presence of the Germanic idea of law« for the further development of German law »in the spirit of a wholesome social order,« and to bring to this project the task of the Germanists to »demonstrate the character of German law as a living object,«[107] just as Romanists have the task »to keep alive the eternal accomplishments of the Roman spirit of law and to continue the incomparable art of Roman law into the presence and make it useful for it.«[108] With such grandiose pathos Gierke underlines in a very different context once again the dual perspective of the Historical School of Law, as Savigny had depicted it once in his *Beruf*. In the preface to each of the volumes this kind of pathos can be found, attributing a major role to the German spirit of the people, the soul and life and youthful power of the German people.

Among his writings, Gierke's *Deutsches Privatrecht* has received the least acclaim, and was the least influential. Scholarship concerning private law turned to German Civil Law Code and the urgent issues of the day, regardless of the fact that many of the issues were taken up and resolved along the paths suggested by Gierke; for example, making systematic-conceptually organized law more flexible by means of general clauses.

Gierke's *Deutsches Privatrecht* is thus quite different from his other, more legal-historically oriented writings, in terms of its continued impact, and is at a disadvantage compared to them. Particular writings and ideas of his concerning legal doctrine retain more of a presence, among them especially his writings on corporations based on the principle of *Genossenschaft*.[109] With the existence of the German Civil Law Code, Gierke's *Deutsches Privatrecht* obviously lost its significance for the study of the law, in ways other than Gierke wanted and anticipated it. In its basic structure and its treatment of individual issues it followed the German Civil Law Code almost in a positivist vein, and even more closely the Pandectist scheme *personae – res – actiones* in the sequence of personal law, law of property, and law of obligations. Only when he dealt with particular institutions and issues did he try, as was his designated procedure, to depict Germanic-law institutions and developments and contrast them with ones rooted in Roman law.

He thus hoped that an approach rooted in Germanic law was capable of influencing the future development of law, carried along by the German spirit of the people. But these paradigms of the Historical School of Law were no longer applicable, as German jurists now used the German Civil Law Code and other modern law with the liberties with which the development of methodology after the revolution against jurisprudence of concepts had provided them. Even though Gierke in the materials he used in his *Deutsches Privatrecht* provided reference points for alternative interpretations of law to relate to, the historical perspective was now seen rather as a detour or the wrong way to approach the study of private law. The vast amount of material in Gierke's *Deutsches Privatrecht* has not been analyzed and categorized to this day, not even from a legal-historical point of view. The historical-critical commentary on the German Civil Law Code at least attempts this in a few cases.[110]

More historically oriented accounts, among whom Jakob Grimm's *Rechtsalterthümer* stands out as the most prominent example, receive much more attention today than Gierke's *Deutsches Privatrecht*. In this publication, in contrast to the volumes of the *Genossenschaftsrecht*, in order to afford it greater legal validity and import, he appears to have approached his various historical sources too much from a conceptual-rational and systematizing perspective. Gierke's *Deutsches Privatrecht* did not amount to a »German doctrine of law,« as Heinrich Mitteis characterized his own contribution of a German private law compendium,[111] as an alternative to Roman law, as much as some elements of such a doctrine exist. For such an alternative Gierke would have had a more solid basis had he incorporated approaches in the sociology of law and in comparative law, which he employed in such fruitful manner in other places,

107 In the preface to volume 1, Allgemeiner Teil und Personenrecht, 1895.
108 In the preface to volume 2, Sachenrecht, 1905.
109 On this, see Das Genossenschaftsprinzip und die deutsche Rechtsprechung, 1887.
110 Schmoeckel et al. (2003 ff.).
111 Mitteis (1959), introduction to chapter 1 (Die Aufgabe) 1, in no. 4 in the various editions.

without a fixation on the »transient shell of a Germanic spirit of law« (Hugo Sinzheimer).[112] One might characterize Gierke's *Deutsches Privatrecht* with another phase created by Heinrich Mitteis in reference to attempts of Germanists to elevate a systematizing science to the status of a source of law: The attempt was a mistake, albeit a fruitful one.[113]

4. *Conflicts about Public Law: Conceptual-Juristic Positivism vs. Historical-Organic Political Theory (Laband–Gierke–Jellinek)*

The picture would be incomplete if we were to look for a continuation of the tradition of the Historical School of Law only in private law. The conflict over the issue whether the codification of civil law was to be based on Romanist-Pandectism or also on Germanic law has received too much attention and led to a neglect of looking at a larger picture. In Gierke's writings the picture of German legal scholarship emerges in a more complete manner. In all of his volumes on *Genossenschaftsrecht* Gierke continued the Germanist tradition of writing a comprehensive history of law and the constitution. The development of the state, as the core area of all of public law, is seen by him as a long-term historical process. He views its social and political foundations as well as the conceptual depiction of this form of communality as emerging from dialectic relations between principles of authority (*Herrschaft*) and *Genossenschaft*, which put him into bitter conflict to the constitutional historian Georg von Below.

Both consider their historical accounts to have current political relevance for the nation. For Below the »German State in the Middle Ages« develops as early as during the early medieval period from the interplay of the monarchy, the kingdom, and the aristocratically shaped fiefdoms; this condition for him remains determinative for the further development of German constitutional history, up to the Prussian-German monarchy of the Hohenzollern. Gierke's argument is very different.[114] For him Germanic legal thought, in contrast to Roman legal thought, lacks the notion of the state; the duality of »emperor and empire« (*Kaiser und Reich*) remains an obstacle to a conception of the state during the Middle Ages. Because of this condition the »first communality that is truly state-based« emerges on the basis of both citizenry and cooperation (*bürgerschaftlich-genossenschaftlich*) in German cities from the 12th century onward. The concept of authority emerges only on the foundation of ties rooted in *Genossenschaft*. This allows the functional separation of public law from private law in the cities. This historical process can be understood conceptually with the aid of Roman and Canon law and their respective notions of corporation, and with the development of the concept of sovereignty in the theories of theology and political science: the state emerges as a separate legal entity, as a juristic person. It may tie itself to princely state, but its proper origin is in Republican communality. In this way Gierke uses his approach in theory and history to develop a differentiated picture of the emergence of the state that was also consequential for historical scholarship. The embittered conflict with Below, but also the Germanists' tradition of constitutional history, makes clear what the necessary consequences were for current debates over the organization of the state and its constitution.

From this perspective Gierke repeatedly addressed current debates in the realm of public law. He saw the theoretical basis of proceeding in this way in his thesis of unity of law in the Germanic-German tradition and the category of social law, transcending the separation of public law and private law, as opposed to rights of the individual. This concerns individuals in their social connectedness, from the family to the state. In the four volumes of his *Genossenschaftsrecht*, in combination with his book on Althusius, Gierke provides not only a history of the development of the legal concept of the state, but also a history of the underlying theories in theology and political science. This characteristic in particular led to an intensive reception of his work in Anglo-American scholarship,[115] but also in Italy.[116] The English

112 Sinzheimer (1922).
113 Cf. Thieme (1971), column 705 at the bottom.
114 See Dilcher (2011).
115 The reception of Gierke in the English-speaking world occurred through F. W. Maitland, a leading legal historian; on this, see Kumin (1995).
116 For Italy see the remarks in Betti (2014); see especially the introduction by Eloisa Mora, p. XV note 15.

translations of parts of his writings are entitled *Political Theory of the Middle Ages* (Maitland 1900), *Natural Law and the Theory of Society* (Barker 1934), and *Associations and Law* (Heiman 1977). These titles evince clearly how Gierke went beyond the legal-historical horizon, his starting-point in his academic discipline.

Apart from the large-scale historical-systematic depictions of his *Genossenschaftsrecht* Gierke continued to take a position on issues of public law in (sometimes monograph-length) essays and lectures. He not only took into consideration historical issues and issues related to a theory of the state, but he also developed–here more than anywhere else–his epistemological and legal-philosophical perspective.

To be mentioned above all are his early essay of 1874, »Die Grundbegriffe des Staatsrechts und die neuesten Staatstheorien,« his critical review in *Schmollers Jahrbuch*, »Labands Staatsrecht und die deutsche Rechtswissenschaft,« and toward the end of his life his lecture on current political events in 1919, »Der germanische Staatsgedanke.« In between these scholarly activities there were years of battle concerning the codification of private law.

As early as in his *Grundbegriffe* of 1874, published soon after the first volume of the *Genossenschaftsrecht* and the proclamation of the German Empire, did Gierke establish his position on epistemology and legal philosophy, situated in-between logic formalism and metaphysics. He was convinced that science had to accept that it was not fully able to comprehend reality with its tools of logic, but could attempt to approximate it on a steady basis.[117] He reiterated this perspective in a lecture entitled »Das Wesen der menschlichen Verbände« in 1902. In it, he developed the notion of the reality of human associations on the basis of an organic perspective, but he remained critically aware of the issue of comparing organisms to social structures. He also expressed an immanent critique of Georg Jellinek's *Allgemeine Staatslehre*, which had just been published. A unified though respectful response by both Jellinek and Max Weber followed, which will be addressed shortly. Both of them argued, in an internally consistent manner, on the basis of Neokantianism's critique of knowledge. This deepened foundation of Gierke's thought in legal philosophy led the then Russian (later French) legal philosopher and sociologist Georg Gurwitsch (Georges Gurvitch) to express his special appreciation in his extensive obituary for Gierke in 1921.[118]

In the area of public law, Gierke's critique of Laband is particularly significant. Gierke thereby takes on a new, formally structured constitutional law,[119] whose legal significance he acknowledges.

This new constitutional law emerged from the writings of two former Germanists and scholars in commercial law, Gerber and the aforementioned Laband. At first they turned to the stringent conceptual logical of Pandectist methodology and applied it to their own Germanist area, German private law. It was a perspective that Heinrich Brunner termed an undertaker of Germanic law institutions, and to which Gierke applied his even more colorful metaphor of having killed the German soul in German law. Gerber had been the first to apply this methodology to German law, and Germanist legal studies provided the bridge to public law. Laband, who too had a background as a Germanist and commercial law scholar, had used this methodology as the basis for his grand interpretation of the Imperial Constitution of 1871. Gierke fully acknowledged this legal achievement, but he did not consider it sufficient to address fully one of the core issues of the law of the state. His criticism centers on the conceptual-legal methodology being reduced to pure logic positivism, which had been imported from Pandectism into public law. Gierke knew how to apply the results of his methodological-theoretical critique into substantive law in ways that had very important consequences.

Given his perspective regarding logic and methodology Laband could only conceive of the state

117 In his review of Dilthey's Einführung in die Geisteswissenschaften, Gierke (1884) elaborates on his point of view: He agrees with Dilthey that the adoption of a concept of science based on natural science, which is ultimately founded upon a »naturalist metaphysics,« is to be rejected. Joining Dilthey, he also rejects making metaphysics the starting point of humanistic knowledge; however, metaphysics remains necessary in order to make possible, beyond scientific knowledge, a complete, though always subjective, understanding of the world.

118 Gurwitsch (1922). As Georges Gurvitch he later worked in Paris und in England as influential sociologist of law.

119 Pauly (1993).

from the perspective of authority, not of cooperation, that is to say, of participation by the people and the liberty of the citizenry. Gierke shows how the basic conception of the German constitution of 1871 as a compromise between monarchy and citizenry has important repercussions: it allows the analyst to recognize that the status of the Imperial Diet is elevated from being a mere factor in the legislative process to an institution of the state, and how basic rights that were not included in the Constitution can be brought to develop out of the overall legal structure of the Empire and the individual state constitutions, as well as from individual bodies of law such as the code of criminal procedure, into integral parts of the prevailing constitutional order. There was nothing in Laband's approach and his logical-positivist method that would allow for such a strengthening of the liberal and democratic elements of the Imperial Constitution. Standing in the tradition of Germanists who used historical arguments, but also using an epistemological perspective that is programmatic and critical of positivism and its deductive logic, Gierke is able to reposition the constitutional order of the German Empire of 1871 closer to the constitutional tradition of the St. Paul's Church. He expands the method of interpreting the constitution by adding a historical dimension and a theory of the state. He demonstrates, in a manner that is valid beyond constitutional law, how the more logically stringent method of legal positivism and formal logic does not take into account certain connections with reality and value backgrounds of judgment, and is no longer capable of recognizing and addressing such shortcomings.

In regard to the starting point of our consideration, that is, the historical impact of the Historical School of Law in the humanities, we come to the following conclusion: elements of Savigny's theoretical founding of the school that had long been intertwined and complemented one another in a dialectic fashion, namely the *ratio* on the one hand, the accounting with concepts, pushed to an extreme in the form of an »exaggerated rationalization« utilizing the notion of a system (Max Weber), and on the other hand, the cultural embedding of law in history, society, and politics – these opposing elements Savigny termed technical and political elements of law – intersect after a long journey through German legal science in the 19th century in the conflict over the interpretation of the constitution of the empire of 1871. They confront each other in the form of a poignant controversy over methods and values, based on different epistemological perspectives. What had begun as the founding of a new science of private law now ended as a battle over the methodology and interpretation of the constitution in public law.

After the turn of the century the theoretical debate over logic and positivism was continued on an even higher level and a corresponding epistemological plane, that is, reflecting the reception of Neo-Kantianism on the one hand, and the renewal of historical hermeneutics by Dilthey on the other, between Georg Jellinek, Max Weber und Gierke.[120] We have already addressed it briefly. Georg Jellinek too intended to overcome legal positivism's reductionist notion of the state by developing a general theory of the state, for which he quickly received positive recognition. Since from his own theoretical viewpoint he has to reject the combination of the normative and the empirical level of analysis, which he sees at work in Gierke and the organic theory of the state, he creates a dual image: a general social theory of the state, and a general legal theory of the state. Gierke's response occurs in his speech entitled »Das Wesen der menschlichen Verbände.« Max Weber critiques Gierke's metaphysical point of departure concisely and precisely, when he establishes his methodology of the social sciences, as does Georg Jellinek in a later edition of his *Allgemeinen Staatslehre*. Both types of critiques are directed very precisely toward the metaphysical and ontological foundations of Gierke's conceptualization, and much less toward particular contents. Weber's concession that Gierke's perspective was heuristically tremendously fruitful for Gierke's own writings and scholarship in general (for example, in recognizing the cooperative structures of the medieval world), leaves the final conclusion open to debate. How can a perspective that is tremendously fruitful be wrong on the epistemological level? Gierke himself several times provides a theoretical justification for

120 On this dispute between Gierke, Weber und Jellinek (some of which took place in notes) see Dilcher (2016d).

his idealist position (notion of the law, reality of the legal entity), and he himself took a critical look at the problem of the metaphysical foundations of scientific knowledge, especially in his review of Dilthey's *Einleitung in die Geisteswissenschaften*.[121]

Within a very different constellation of jurisprudence around the turn of the century the two traditions of the Historical School of Law, namely, the Romantic-organic one aiming to be comprehensive, and the other one, which was more logically and rationalistically oriented, once more engaged on a theoretically more elaborate level in a scientifically productive debate. This debate between the different basic philosophical and epistemological positions continues to the present day.

5. *The Historical School of Law in Retrospect*

The complex issues that have been discussed so far make a summary review desirable before we address the continued effects of the phenomena addressed here.

Savigny's founding document *Vom Beruf unserer Zeit* constituted the starting point of our analysis. It presented itself as a comprehensive response to a breakdown of legitimacy engendered by the great European revolution, reflected in semantic changes during the »threshold period« (Koselleck). In his cultural historical approach, Savigny bases the legitimacy of law in history, as a turn away from religious as well as rationalist natural law, but equally as a rejection of a positivistic reliance on the power of the state to set laws. Rather, it is historicism based on the values of a national and European cultural tradition that provides a foundation for the creation of law. The changed meaning of concepts and relationship between realm of experience and expectations about the future observed by Reinhart Koselleck during the »threshold period« are at the root of the change in paradigm. Savigny was able to provide a response to these changes that recurred to the universal concept of culture of Romanticism. Savigny's text became one of the outstanding examples of German literature due to its stylistic use of language, but also due to the interpretation of culture it provided.

Law's legitimacy is set out to rest on two pillars. First, there are collectively created cultural traditions of a nation, in which we have recognized Romanticism's intellectual novelty. Second, there is also rationalism, founded by Roman jurists and developed further since, which with Max Weber we came to consider an ongoing process of rationalization in the 19th century. A fundamental feature of the development of law was also the connection between law and reality, that is, social conditions in their historical, legal-methodological and -political dimensions. This connection gained in importance for law as a science from the mid-century onward after the failed revolution of 1848, in the form of the political and literary dispositions of a new realism.

From this perspective we are able to discern tendencies and profiles in the landscape of German law in the 19th century that have previously hardly been recognized before. Max Weber was able to put these conflicting directions pursued by Romantic historicism and rationalization into sharper relief. His concept of »exaggerated rationalization« in the form of abstract and systematic concept formation and of the doctrine of the »law without gaps,« which prohibited an understanding of the irrationality and the contingency of reality and of basic societal values, provided an ideal-typically exalted but convincing interpretation of the path taken by Pandectists. Weber recognizes in this situation an aporia of rationalization. As he points out, the development of a class society creates new interests and ideological approaches that no longer can be integrated into the conceptual classifications of private law. The rejection of the label »jurisprudence of concepts« in newer legal scholarship must therefore probably be reconsidered and relativized. The rebellion within legal scholarship, from Jhering to the Free Law school to the positions of the jurisprudence of interests may thus be viewed against this background as a joint reaction to the increase in rationalization, and they therefore also gain in legitimacy. Wieacker's analysis of the role of jurists facing new problems of justice must be placed once more in this context.[122] The fact that late Pandectism in Windscheid brought forth a highly important jurist with balanced

121 See above note 117.

122 Franz Wieacker himself has taken a position on the entanglement of his own social convictions in National-Socialist ideology: Wieacker (1976/77).

judgement can be reconciled with this characterization.

In the area of private law, within the process of rationalization, which corresponded to the demands of a market-based industrialized society (Max Weber: »commercial and industrial pressure groups«[123]) for clarity and calculability of law, the Germanists were in a weaker position than the Pandectists from the beginning. Their subject matter was particularistic in its sources and splintered in its arguments and concepts, and tied to the »irrationalities of estate-based society« (Max Weber). It lacked a system of concepts of Roman law developed by professionals, and the systematization by medieval scholastic jurisprudence. This was particularly applicable to the law of obligations, which, governed by the maxim of freedom of contract, was destined to become central to areas of modern law. What the Germanists had to offer were legal texts that had accompanied the development of modern economic society from the economy of medieval cities. The forms of economy in Roman society offered little beyond the central area of general contract law, as it rested on very different foundations in terms of markets and entrepreneurship.[124] Here, as in other areas of forms of community and society and individual liberties, but also property law, there was an opening for the approaches of Germanists. It allowed them to use their types of sources in order to develop legal principles that offered legal solutions to new problems of modern economic and industrial societies. In this area Germanists often were quite creative in interpreting their texts and developing elaborate legal concepts. Germanists' methodology assumed its unique character in this way. As an exception to this development, Gerber's and Laband's approaches then completely turned toward the Pandectists' conceptual methodology, but when they did, they were charged with being treasonous to Germanist law. The field of tension between legal subject matter and scientific methodology make it plausible, then and now, to speak of »Romanist Germanists« and »Germanist Romanists.«[125] Yet the contrast we have developed between the broad, social »Romantic« approach that transgressed borders, and the rationalist-conceptual perspective is capable of addressing tensions within the science of law at a deeper level.

The aforementioned Romantic impulses can also be found among some Romanists. For example, one might think of the consequential »discovery« of mother-right by J. J. Bachofen.[126] A parallel can be found on the Germanist side in the person Wilhelm Arnold and his *Cultur und Rechtsleben*, rediscovered by Karl Kroeschell,[127] and Arnold's turn to older settlement history, which extends far beyond the realm of legal history. The expansion of Theodor Mommsen's scholarship into Roman constitutional law and his *Römische Geschichte*, which was found worthy of the Nobel Prize in literature, are also remarkable transgressions of boundaries beyond the Pandectists' perspective. Max Weber takes it even further in his Habilitation, in which he goes beyond the concept of property and attempts to consider the entire agrarian constitution and the developments of ancient capitalism, and even includes the techniques of Roman land surveyors in his analysis.[128] To these transgressions of boundaries one can add the »irrationalist« revolts against Pandectism by a Jhering, a Hermann Kantorowicz, and based on the latter's free law doctrine Eugen Ehrlich's turn toward a sociology of law – all of them were Romanists by training. Finally, one should mention the switch made by Max Weber, trained both in the Germanist and Romanist tradition, from law to the empirical social sciences and economics, for which he drew on the legacy of the Historical School of Law and its conceptual-theoretical understanding of reality. These individuals all began their intellectual journal due to discontent with Pandectism's concep-

123 As argued by Weber, WuG (1972) 505 [»Interessenten des Gütermarkts«].

124 On this Capogrossi-Colognesi (2004).

125 Kern (1984), especially 17.

126 Johann Jakob Bachofen, a member of the Basel patriciate, in 1861 published a study in which he argued against liberal-positivist Romanism: Das Mutterrecht. Eine Untersuchung über die Gynaikokratie der alten Welt nach ihrer religiösen und rechtlichen Natur. This study was ignored in the discipline, but it constituted a contribution to a better cultural understanding in the future.

127 Kroeschell (1975).

128 On this Deiniger, MWG I 2 (2010) Introduction; Capogrossi-Colognesi (2004).

tual-rationalist approach that had become one-sided, but they retained their interest in Roman law. From the diversity in this picture emerges the monumentally important work of Otto von Gierke. He combined in his writings the continuation of older Germanist approaches (co-operative law – *Genossenschaftsrecht*) with the thematization of surprisingly modern themes, which allow him to approach the »social question« with a mixture of openness toward society and conservative values (in terms of social policy, his work was continued by his daughter Anna). These developments occurred against the background of philosophical presuppositions that are not easy to analyze and that he himself made explicit only in regard to few aspects of his work. These philosophical presuppositions ground in German idealism, without a doubt. On the basis of the approach of the Historical School of Law, to which he professes his allegiance in a last look back in history, he develops a historical picture and a theory of law and society originating in the dialectics of rule and cooperation, which allow him not only to provide a far-reaching critique of constitutional positivism, and to establish collective labor law, but also to have a clear vision of the constitutional and welfare state that is to be established in the context of the situation in 1919. Within the constellation Gierke – Weber – Jellinek, developed out of the Historical School of Laws, there is a mutual epistemic critique of their positions, which reflect the high level of sophistication in these positions.

That Gierke's work did not continue to be influential in all its breadth is likely due to the fact that his concept formation had a strong Germanist-nationalist undertone and ideological foundation, and that he used a corresponding rhetoric, especially in his speeches. He wanted to pursue a purpose that we would call nation building today, in the same sense as Cavour, when he spoke of the task »fare gli Italiani.«[129] This motivation existed among many historians at the time, irrespective of their national origins. Even though many of his remarks on the purpose of law were of a groundbreaking nature, when Gierke used expressions such as »national character of legal thought that is impossible to shed« and »the workings of Germanic spirit of the law,« it was clear that this legal ontology could not have a future at a time of an increasing universalization of law. The national and Germanic tinge of his argument, and his emphasis on social aspects, could later be interpreted along the lines of National Socialist ideology of law by an aberrant branch of Germanists (Herbert Meyer and others), while keener theorists of law in National Socialism such as Reinhard Höhn rejected Gierke as a dangerous representative of a progressive civil position, and Marxists such as Spindler were equally critical of the social policies inherent in Gierke's thought and considered them anti-revolutionary.[130]

In the realm of labor law Hugo Sinzheimer in his obituary of Gierke had spoken of a Germanic spirit of law that provided an ephemeral cloak for Gierke's thought, a thought that left open the future development of law. For the concept of *Genossenschaft* Peter Landau has recently distinguished the discovery of its ethnologically universal character from the context of its overly narrow foundation in Germanist law. The nationalist motive in Gierke was thus a stimulus and a limitation at once. Medieval studies (by Oexle and Blickle) in recent times have transcended this limitation and recognized specifically the importance of the concept of *Genossenschaft* for an understanding of medieval forms of associations. Finally, as far as the doctrinal-legal aspects of Gierke's writings are concerned, as much as they have sketched out the horizons of legal policies and provided a new basis for some areas of law such as corporate law, in regard to his *Deutsches Privatrecht* they did not amount to being a counterpart to the Pandectists' compendium. The Pandectists' compendium then became the foundation for the new compendium on the German Civil Law Code. In comparison, Gierke was too committed to doctrinal-conceptual methodology in order to be able – continuing, for example, Jacob Grimm's *Rechtsalterthümer* – to develop a merely historical account of older German law. In this book, Gierke had left the Germanists' historical path in favor of working on doctrine and had arrived too late compared to the German Civil Law Code.

When looking at the Historical School of Law and its field determined by its cultural-historical and its rationalizing-conceptual branches one can

129 See above; prior to note 21.
130 Spindler (1982) has provided new critical impulses.

see its continued influence reflected in pure, rebellious, and harmonizing positions up to the turn of the century. It had not come to an end in mid-century. Its consequences were a civil law codification in elaborate conceptual perfection, but also a divergence of legal approaches, content-wise and methodologically, that ensured the codification's adaptability for the future. Last but not least, it tied the study of law to the emergent sciences of culture and society, whose trajectory of development had, in turn, been influenced by the Historical School. A final section of this essay is dedicated to analyzing the continuation of this configuration from the turn of the century onward.

IV. Consequences Extending into the 20th Century

1. *Law and Politics After the End of the German Empire*

The history of private and constitutional law in Germany was characterized by deep discontinuities at the beginning of the 20th century. It had a new beginning, but it would take until the emergence of the Federal Republic after World War II to have a certain level of continuity and stability. Up to the turn of the century, private law was founded upon a plurality of historical sources that were dominated by those in Roman law. The codification of the German Civil Law Code provided its imprint on it thereafter. Moreover, constitutional law changed in a revolutionary way from constitutionalism based on a monarchy to republicanism. In this setting German legal scholarship was able to provide a basis for continuity to both transitions. A century of engagement with history and theory in the context of the development of western law and state, as well as the development of new approaches in legislation and constitution, have provided a space of experience for it that endowed legal science with a high capacity for reflection and flexible application of the law. Several developments testify to this: an application of civil law, rooted in methodology, that is more open to being applied to new problems, based on a reflexive use of methods; the initial development of a law of labor contracts derived from contracts of service, and of a collective labor law including strikes and collective bargaining; and an intense discussion about the foundation of law in the area of constitutional law.

These developments are based on a distinct conceptual foundation of 19th-century legal scholarship, but also on currents within the Historical School that moved in different directions and were critical of all forms of conceptual jurisprudence, as we have established above. These include the continuous inclusion of social aspects and the search for alternative modes of thought and legal form on the part of the Germanists; the methodological-theoretical rebellion on the part of the Free Law Romanists and other alternative Romanists; and the dispute between strict juridical-conceptual and historic-organic approaches in constitutional law. The latter later led to the famous battle of methodology in the 1920s between constitutional positivism and »humanist« methods. Even though after the monarchy among the population as well as constitutional scholars there was a wide spectrum of political perspectives ranging from social democratic to reactionary ones, »contemporary constitutional scholarship was well … aware of the fact that constitutional law had to be placed on a new foundation.«[131] This is what happened, on the basis of the positive applicability of Weimar Constitution,[132] even though differences existed in terms of values and theories on how to interpret it.

The new political and constitutional situation, as well as the internal and external crises accompanying the short history of the Weimar Republic, led to new directions in constitutional law, especially among the younger generation of scholars. The basis of this development was the German tradition of science: at its center a »realist« and open positivism, represented, for example, by the leading constitutional scholar Triepel, and next to it a continuation of the logical-conceptual-constructivist tradition, intensified in its theoretical components, by the Vienna School and, above all, Hans Kelsen. On the other hand there were others who related to the organic-humanistic tradition and the consideration of social aspects, represented

131 Stolleis (1999) 90.
132 Stolleis (1999) 79 f., uses the term inner continuity.

by Rudolf Smend in particular. Carl Schmitt stood as an ominous figure of unpredictable intellect in-between and above it all. An open question remains, looking back: Do continuities to National Socialism exist, in the sense of historical causalities, when it comes to ideas and not merely individuals?

We have rejected the argument of a strong continuation between Germanists in law and legal theory in National Socialism when looking at the example of Gierke.[133] Initially, the »evidence« pointed to the existence of such a continuity:[134] the combination of thought in national terms and Germanic ideology, the rejection of »Roman individualism« and an emphasis on social aspects almost up to an anti-Marxist socialism, and finally article 19 of the Nationalist Socialist party program with the demand for the »replacement of Roman law serving a materialist world order with a German communal law.« The willingness of some Germanists, such as the older Germanist Romantic Herbert Meyer and the young Karl August Eckhardt, inspired by the youth movement, as scientists to align with the »movement,« and thereby to construct such continuity on their own, supported such a thesis of continuity. And, finally, there even was the slogan »back to Gierke.« However, precisely this slogan was rejected by a keen analyst among National Socialist law scholars, Reinhard Höhn, as a tragic mistake; rather, Gierke, according to him, was a particularly dangerous representative of liberal *bürgerlich* legal thought for his reform-mindedness.[135] Our analysis of Gierke's dialectic between rule and *Genossenschaft* shows that it did not result in an affirmation of a National Socialist leadership over the community. To the contrary, with the *Genossenschaft* Gierke always wanted to strengthen, in the spirit of the liberalism of the St. Paul's Church, an aspect of community that was democratic at its core.

In this sense he conceives as a »Germanic notion of the state« the vision of a legal and social structure in the context of the situation of 1919 and contributes to the creation of the Weimar constitution, as does his daughter Anna. Hugo Preuss, his student in the law of the *Genossenschaft* and trending more leftward, was one of the leading authors of the constitution.[136] Despite his strong ties to the nation state of 1871 and the Prussian-German monarchy, and his dismay over the loss of the war, Gierke did not let himself be seduced into holding anti-republican views. He rejected anti-Semitism – which was also directed against his daughter Anna at the time – in his writings and by leaving the national-conservative German National People's Party.[137] This event, as noted by Carlo Schmid, later to become an important Social Democrat, in his memoirs,[138] became known as the »case Gierke« and for many marked the emergence of ties between national-conservative thought and anti-Semitism. Leadership cult and anti-Semitism as pillars of National Socialist ideology did not have any basis in Gierke as the last representative of the Historical School; the opposite is the case. His daughter Anna, discriminated as a »half-Jew« and deprived of her social life's work, had connections to Protestant-conservative circles of resistance in the 1930s and 1940s and was subjected to persecutions.

The analysis of Gierke's position in regard to National Socialism shows how intellectual thought in search of historical-causal continuities can rather impede a critical analysis of the intellectual and political situation at the time. Such thought glosses over differences in regard to values and decisions, but also does not point to the attraction of new opportunities for promotion and activity in times of extreme crises. From another perspective, too, the continuity paradigm impedes the analysis of the ways in which National Socialist ideology, at a time of devolving certainty, fuses splinters of tradition in order to, first, win over voters from unsettled milieus in the German population, and then retain them as masses for providing legitimation: the embittered,

133 For details, see Dilcher (2013b).

134 A clear description can be found in Stolleis (1989). Rückert / Willoweit (eds.) (1995) provided the impetus for Dilcher (2013b), as in that volume many authors without much analysis assume a long-term continuity between National Socialism and classic Germanists.

135 See Dilcher (2013b).

136 On Hugo Preuß see the pertinent overview by Schefold (1993).

137 See Dilcher (2013b).

138 Schmid (1981) 152.

anti-Semites, disappointed Socialists, nationalists, conservatives, Christians, atheists, and rebellious anti-bourgeois youth.

If one interprets with Heinrich August Winkler the political history of Germany as an obstacle-rich »long journey toward the West,«[139] then we can find in the tradition of the Germanists, on which we have focused here, an aversion to the revolutionary French model of the constitution and democracy, which may have its origin as far back as in the wars of liberation against Napoleon. The tradition opposes the triad of liberty, equality, and fraternity, understood as being individualistic and revolutionary, and it also opposes a state that is strictly secular. In contrast, the historical-organically rooted path of countries such as England, the United States, but also Switzerland, the Netherlands, and the Scandinavian countries is afforded the function of a model for the difficult history of the German nation – which reflects a point of view that came apart in part over Wilhelmianism's boastful demeanor toward England. For many Germans it was not simply about a journey toward the West, but about an orientation toward finding the nation's own identity. Only the national catastrophe brought about by Hitler ultimately established the »alignment with the West« of the Federal Republic and the reconciliation with France. Differences that continue to exist over structures of the welfare state, the relation between state and religion, and mentality in general reemerge with the European process toward unification.

On the basis of a cultural sense of crisis among the *Bürgertum* of the fin de siècle and the European catastrophe of World War I, German historians and jurists felt compelled to deal with this situation by developing a more comprehensive interpretation of history, often combined with developing a vision of the future. In this characteristic we can recognize a parallel to the ways in which the Historical School and Romanticism dealt with discontinuity during the »threshold period« one century earlier.

Based on their historically oriented approaches both Gierke and Max Weber display a noted skepticism in regard to future developments in modernity.[140] Gierke was concerned about a breakdown of the internal balance between the principles of rule and cooperation, which could occur as large-scale associations of domination rooted in private law, that is, private enterprise, would take the individualist epoch of the economy to an extreme, resulting in a revolution by the masses of workers. The result of this revolution would be the ossification of the organism of the people's community and the end of individual liberty. For him, this would amount to no less than the looming end of the development of our culture. Weber on the other hand perceives, on the basis of his thesis of rationalization, the danger, similar to Gierke in regard to its consequences, of a thoroughly ordered system of domination in both the state and the economy. It would suffocate, in the form of the famed »iron cage of dependency« under the leadership of a class of pure experts, any individual spontaneity.

Of interest to us in this context is that both Weber and Gierke construct a vision of a menacing future on the basis of an interpretation of history that employs a long-perspective and includes the entire history of Western societies. Each scholar's construction yields a respective »antidote«: for Gierke, the strengthening of the cooperative elements in society in order to control unfettered individualism, for Weber the loosening of authority's rationalism through charismatic figures within a developed parliamentarianism.

A younger Germanist legal historian was also influenced by World War I in such a way as to transcend the established scientific approaches of his discipline. Eugen Rosenstock (1888-1973) had established his qualifications by publishing research on the history of medieval law that is held in high regard to this present day, and he was appointed a professor in Breslau in this field.[141] The post-war conditions prompted him, however, to take on the role of a social reformer in practice and in theory, a role he continued to take on after he had become a refugee from the Nazis and emigrated to the United States. In order to come to terms with the war intellectually, he came up with an account of history that drew on an entirely novel interpretation of European-western history to analyze the presence.[142] For him, revolutions

139 Winkler (2000).

140 On Gierke's and Weber's perspectives toward the future, see Dilcher (2016d).

141 On Rosenstock, who added the last name of his wife (Huessy) while in the United States, see especially Faulenbach (1982), Thieme (1989).

142 Rosenstock-Huessy (1931).

rather than continuities determined the intellectual-political character of Western culture and the development of the nations that belonged to it. The »papal revolution« of Gregory VII established the separation of spiritual affairs from secular ones, and the German Lutheran Reformation was a revolution of the aristocracy at the same time, while the English Reformation led to a revolution of parliament. For him, the Russian revolution followed the French one, and it coincided with the world being transformed by the war. Similar to Max Weber, Rosenstock asked the question about the type of humanity that is created by these events and assumes a dominant role.

As we will see below, an American student of Rosenstock-Huessy, Harold J. Berman, has reintroduced into the scholarship of legal history a recognition of its world-historical significance. This opened up a new perspective to the field beyond a positivist-historical one.

Before we get to this issue we shall have a look at another German historian whose writings proved significant for the history of law, and who in the post-WWII period also transcended disciplinary boundaries in regard to science and politics as well as developed a perspective on world history: Fritz Kern (1884-1950). Kern started out as a historian of medieval constitution. He received his training in legal history from the great editor Karl Zeumer, and he likely also attended lectures by Heinrich Brunner and Otto von Gierke. We shall address his writings in medieval history, in so far as they were relevant to the history of law, shortly. In the context of our discussion, let us turn first briefly to his difficult, meandering yet innerly consistent intellectual-political journey. His biographer described it as »from bourgeois to citoyen.«[143] With his roots in civic Wilhelmianism and being motivated first by national exultation and then the shock of the war and its end, Kern renders service to nationalist propaganda and a defensive-aggressive discussion of the question of responsibility for the war following Admiral von Tirpitz during and after the war. Yet in the 1920s, now under the influence of Stresemann, the major democratic politician of the Republic, Kern developed ideas for a European peace order. Always been active as a political publicist as well, Kern perceived nascent Hitler's National Socialism as a reaction to Versailles, and thus has some points of contact with, and an understanding of, parts of National Socialism's program. After the seizure of power in 1933 he distanced himself more and more, however, and while his increasing interest in a universal history of humankind from its beginnings had led him to develop his own doctrine on race, he demarcated his doctrine brightly from National Socialism's. During World War II he had close contact to, and collaborated with, the conservative resistance against Hitler, and given the danger that resulted from his activities, he fled to Switzerland. From there the cultural politics of the French General Schmidlin, who was in charge in the French zone of occupation, enabled him to reestablish contact to the German academic world, specifically, the newly founded University of Mainz. In the few years before his death he was able to found the Mainz Institute for European History, a programmatic response to the European catastrophe of two world wars. He was designated to be its co-director. His death prevented it. Still, he was able to plan and launch the grand project of universal history, Historia Mundi, then led by F. Valjavec. Both of his founding projects were to have a lasting effect.

Fritz Kern thus particularly strongly combines the work as a historian with having a political vision derived from history. His personal, political, and intellectual journey reflects a remarkable vacillation but ultimately also a consistent navigation of the landscape of ideologies and fields of powers of the first half of the 20th century toward a European vision of history. His special significance for legal history is discussed below.

2. *Toward a New View of the Middle Ages*

Next to Antiquity, the Middle Ages were, as we have seen, a point of reference for the formation of a *bürgerlich* identity. In this sense the German Middle Ages stood in tight continuity with the image of the ancient Germanic peoples and their migrations in Europe, that is, the »origins.« Yet the question raised by Romanticism about the original, the pristine, that is, the archaic conditions, in Germanist legal studies was displaced and reshaped over the course of the century by current guiding ideas being projected backward in time. They were displaced and shaped by the question about the

143 Schillings (2001).

relationship between monarchic rule and liberty, of people and the state, and, above all, by notions of constitutional state and therefore the modern concept of law being projected back to earlier times. For a leading legal historian such as Heinrich Brunner the history of law had therefore been placed among other legal disciplines, and Rudolph Sohm not only established the statehood of the Frankish Empire in this way, but he also used the positivistic notion of law to deny that Christianity and law were compatible. Together with a few others Gierke adhered to the cultural-historical-Romanticist line of inquiry. He did so by depicting the history of European law as having developed, beginning in the Germanic early period, on the basis of the *Genossenschaft* principles of social order in their dialectic relationship to authority and rule, and by distinguishing his own Germanic-medieval concept of law from the legally determined Roman law concept, historicizing the state and the concept of the state by integrating them into the development of Western law. Around 1900 his perspective was that of an outsider; some regarded it favorably, whereas others fought it vehemently. The then-common depiction of the history of law and the constitution rested on a historical and legal positivism, into which texts were integrated according to modern doctrine, but ultimately anachronistically, into the larger interpretive scheme of a *bürgerlich* constitutional liberalism.

Against this background since about World War I, new attempts emerge to develop a new and different perspective on the medieval world. We do not have the space, unfortunately, to address French medieval studies, which then came together in the Ecole des Annales and developed on temporally parallel paths but were established on a different foundation.[144] In France, the connections between empirical and theoretical social sciences, between anthropology, sociology, and also Marxist approaches on one side and history on the other played an especially important role. In Germany some scholars followed the direction established by Gierke, and more so than has previously been recognized, while social-theory-driven approaches, such as, for example, Max Weber's, were rejected well into the era of the Federal Republic. Among historians, as we shall see, one exception was Otto Brunner. In social and cultural history one can point also to Karl Lamprecht, and in constitutional history, to Otto Hintze.

Since mid-century the law of the church related to Gierke's *Genossenschaftsrecht* in new ways. In this area of the law the Swiss Protestant Ulrich Stutz (1868-1938) introduced the study of church law to the Historical School of Law and established its status among the disciplines in the history of law.[145] A student of Gierke already while in Berlin and later his successor, Stutz emphasized the »Germanic« character of the medieval Church and the parish system in particular. This occurred primarily through his »discovery« of the proprietary church (*Eigenkirche*), that is, the foundation and endowment of a parish church by a seigneur, who retained some powers guaranteed by church law, as was the case later for patronage. As the decades-long editor of the Germanic branch of the *Savigny-Zeitschrift*, and later also the Canon-law branch of the journal (which he also founded), and through renowned students of his such as H. E. Feine and J. Heckel, he was able to expand the field of church law and increase its prestige. His ecumenical contacts to the Catholic church, particularly the Order of St. Benedict, proved useful in this regard. As a Swiss citizen he was able to keep National Socialism's interference in the journal's affairs at bay in the 1930s. Even though recent scholarship has questioned, or even abandoned, certain aspects of the »Germanist« foundation of his argument about the proprietary church, the core finding of his study, and with it, the expanded perspective on the economic and socio-historical embeddedness of pre-Gratian Church law, and the expansion of Christianity in the Germanic regions, remains valid. In this way the reform movement instigated by Pope Gregory VII is provided with a socio-historical background beyond the »investiture controversy.«

Next we can turn our view once more toward the historian Fritz Kern, whose personal path we have already become familiar with. As a young docent he had published two studies before and after World War I, which in new editions remained influential far into the Federal Republic. As a

144 On this see the recent publication by Schöttler (2015).

145 Cf. the obituary by Schultze (1939).

historian Kern had reinvigorated the scientific discussion about the concept of law in the Middle Ages, and he had dominated the discourse about it, experiencing both approval and vehement rejection later. The two studies are the extensive monograph *Gottesgnadentum und Widerstandsrecht* of 1914, which contained many excursions and extensively documented sources, and the less extensive and more thesis-like *Recht und Verfassung im Mittelalter*, which derived from an article in the *Historische Zeitschrift* of 1919.[146] Both were republished in several editions. Together they were published in English in 1939, and in a second edition in 1945, by Oxford.

Kern, who in this phase of his life had nationalist, conservative, and monarchic inclinations, intended to write, from a comparative perspective of the West, a »history of ideas« of the monarchy, shortly before it came to an end in Germany. For him, the counterpart to the legitimacy of the monarchy is the people's right to resist. His aim is to develop a history of the constitution with a view toward intellectual history. The two concepts in the title are intended, as the subject matter of the investigation, to depict the relationship between rulers and people in terms of the foundation of authority, its exercise, and its cessation. The legitimacy of authority, Kern argued, was based on Germanic, ancient, and ecclesiastical conditions. Particularly important to him was the status of the ruler according to the law. The ruler's status rested on tradition as well as the consent of the ruled, and for the church also on natural law. For this reason the chapter »The Ruler and the Law« is central to the book. In it Kern, who rests on Gierke but also on English scholars such as Maitland and Carlyle and on French scholarship, posits the importance of *genossenschaftlich* constraints on rule. He views the political actions of the ruler as dependent on the consent of the assembly, just as the judge in the people's court was bound by the verdict of the jury and had to announce the verdict under his power of command. Thus authority was integrated into law based on consensus, that is, the traditional structure of law – in this regard Kern anticipated future results of medievalist studies.[147] However, since the ruler had the highest power to command, only a right to resist was capable of bringing relief against illegal action on his part. The starting point for this development of counterbalancing power, as Kern shows, lay in the traditions of homage, covenants to elect, and the beginnings of a written constitution, particularly the English Magna Carta. Apart from providing deep insights into the intellectual and political structures of the European Middle Ages, Fritz Kern's study had the purpose of bestowing the foundations of a consensual, prepositivist concept of law onto the state monarchy, broadly derived from the Western and European history of the Middle Ages.

The short but influential study *Recht und Verfassung im Mittelalter* uses clearly articulated statements that often employ ideal-typical exaggerations to shed light on one of these aspects, the medieval concept of law. It is hardly a coincidence that it was published during a transitional period, in 1919, but it retained its influence on scholarship for a long time. Oftentimes, especially in newer commentary, too little attention is being paid to the title Kern had chosen originally: »Recht und Verfassung *in der Anschauung* des Mittelalters« (Law and Constitution *from the Perspective* of the Middle Ages).[148] In his introduction, Kern delimits the subject matter of his study further: He does not intend to describe reality, nor scholars' ideas, but the underlying conscious and unconscious presuppositions of a living legal system and constitution in its breadth. It is not hard for us to recognize the Romantic notion, established by Savigny, of how law and language developed from collective ideas of the people. Kern used Heinrich Brunner's encyclopedic treatise to depict the opposing legal-positivist point of view, which had replaced this notion in the field of the history of law: the treatise, he argued, was a depiction that could be justified on account of its legal aims, and it used modern terminology without prejudice, beginning with private law and the state. The type

146 Kern (1914), Kern (1922).

147 This applies both to the term consensual authority (see Schneidmüller [2000]), and the concept of the *dinggenossenschaftliche* structure of legal findings (see Weitzel [1985]).

148 This specification was rejected by the publisher; see the preface to the reprint.

of depiction, he noted further, provided the realia but no path toward an understanding of the legal thought of the time. – Therefore Kern aims for a type of history of mentalities, but also remains naively committed to legal positivism when he concedes that law can be recognized as realia, and be presented as such, without a hermeneutic embedding in the foundational perspectives of law per se. In this regard, he is not consistent enough.

Kern thus focuses on an area that scholarship in the history of law nowadays terms an orally transmitted legal custom.[149] Law was legitimate, he argued, because it was old, and good as well. He thus relates to the old topos of »good old law,« which, as we have seen, Uhland had mentioned in the context of the question of the constitution in the transition to modernity, and it, too, is based on a consensual notion of law as it pertains to a constitutional contract between ruler and the people. However, Kern expressly applies this notion only to the Middle Ages and delimits it from modernity. For the transitional period he refers to written »customary law« (*Herkunftsrecht*) and the ascending statutory law, but above the both of them, he argued, was the sense of justice still present in orally transmitted law.

Kern breaks with established tradition in accounts of the history of law, which conceived of medieval law entirely as written law and used the classifications and concepts of present positivist, state-set law to analyze and structure it. In Brunner's *Deutsche Rechtsgeschichte*, mentioned above, »orality« is mentioned only as a principle of procedure (!) in Frankish law, but never as the foundation of legal tradition and the finding of justice.

Relating to older traditions of the Historical School and to Gierke, Kern thus opened the door to a cultural-historical interpretation of medieval law as a phenomenon in a world that was structured entirely differently. German legal history did not walk through this door before the second half of the century, and even then in a hesitant manner. The massive, almost defamatory criticism of Kern in most recent scholarship on legal history, which even paints him as an »ominous« scholar, recognizes this much too little.[150] Criticism is justified, naturally, in so far as Kern's findings are destined to become obsolete, just like in any other science; Max Weber has pointed this out. Criticism accomplishes this, but it has to recognize that only after research had been taken in this new direction did it become possible for new insights to replace older ones; otherwise, criticism misrepresents how scientific progress became possible. It seems justified to provide a critical response mainly to those critics who did not recognize the self-imposed limits to Kern's study. This applies to those who relate his statements to medieval law in its entirety, including legal science and the beginnings of the deliberate process of legislation. Critics especially do not realize that Kern's criterion »old« allows us to thematize for the first time the temporal dimension when dealing with the concept of law, and to conceive of law not as »realia« but as a phenomenon of consciousness, and that this idea also applies to its »age«! Could »age« really not be taken as so self-evident that during the transformation to written law »age« was not specifically attributed to »custom« or »origin« (from where else other than a temporal dimension should they derive?). Of course, insights that are available today concerning the topics of *memoria* and cultural memory were not at Kern's disposal then, but he built bridges to this dimension of a premodern concept of law. Regarding the criterion »good« Kern paid too little attention to reform movements within the Church, movements – facing »bad customary law« – that had to insist on a standard based on natural law. Here, too, important research came into being only later. Concerning the newer, vehement criticism toward the »ominous« Fritz Kern we must emphasize that he gave research on medieval law and the concept of law a direction that led away from positivitism's focus on the presence and toward their embeddedness in the history of ideas and mentalities, and also toward their analysis from the perspective of cultural history. The thesis-like formulation of his shorter study cleared a new path but left many flanks open to attack by critics. We should accept the fact that Kern as a conservative European approached a topic governed by tension between knowledge and human interest. In any case, Kern did not use the topos of »good old law« to devalue modern

149 See Dilcher et al. (eds.) 1992.

150 For a statement on the state of the discussion, see the overview by Liebrecht (1996).

positive law, as has been claimed, but rather to differentiate between two types of law.

Two eminent studies by the historian Ernst Kantorowicz constitute important further landmarks along the path toward a new understanding of medieval law. Coming forth from poet Stefan George's circle and seeing great personalities as symbolic agglomeration of transitions, he publishes his biography *Kaiser Friedrich II* in 1927. To the historian, in this emperor North and South, European Romanesque and Germanic cultures combined at an apex in history. At first scholars considered this publication as unscientific, as a »mythical view«[151] – until Kantorowicz followed it up with a detailed volume of sources.

This volume shows that the Emperor, assisted by southern Italian jurists, developed not only his series of laws in the *Liber Augustalis* but a haughty novel theory of the ruler and the state. In this way Kantorowicz provides a broader perspective for the understanding of the legal history in European dimensions. He deliberately intended his work to break the positivist shackles of an ossified *bürgerlich* culture and science; his motivation was rooted in the depths of the Romantic-symbolic thought of poet Stefan George. Interestingly Kantorowicz then responded to the charge of having put on a Romanticist show by arguing that positivism itself had turned toward Romanticism, »to find, without presuppositions, the blue flower of truth – irrespective of the fact that truth does not lie in facts and objects, but in the human being who puts questions to the fact and objects.«[152] Here the engagement between both points of view once more leads to new hermeneutic perspectives, in this case in an obvious reference to Kant by the »Romanticist«! From the perspective of legal thought Kantorowicz is able to demonstrate the foreignness of a large medieval authority figure: the Staufen Emperor was no predecessor of the Hohenzollern Wilhelm II (and even less of Hitler), as much as those two liked to imagine it!

Both volumes provide a transition to Kantorowicz's second significant publication, *The King's Two Bodies*, composed in the United States in 1957.[153] This is no longer about a person, but directly about a theory of law and the state. The author provides an apology – unnecessarily so – for transgressing the boundary to the history of law. His view has a dimension of depth, gained from his book about Friedrich – thanks to Stefan George – and enlivened by the English texts now being available to him, as well as by the tradition of scholarship, especially canon law, that allows him to develop a real »physical« doctrine of the corporation of the state beyond Gierke, who is much cited. The doctrine relates to the material body of the state. The success of the book speaks for itself. The potential of Romanticism, its vividness, and the conception of symbolism as the reality of older legal thought, was realized on the highest level of erudition.

Finally, we should look at a historian who paved the way to the »Middle Ages of the Law« (a phrase we use in parallel to Francesco Calasso's »Medioevo del Diritto«): Otto Brunner. In his study *Land und Herrschaft* in 1939 he laid the foundation for a new understanding of medieval law not shaped by the modern concept of law. This publication was noticed among scholars of the history of law; the first who responded to it positively was a master of the discipline, Heinrich Mitteis, who wrote a very positive and extensive review, which was included among his collected essays.[154]

On the basis of an approach based on regional history, Otto Brunner attacked in a fundamental way the (then largely unshaken) edifice of traditional history of law and constitutional history that rested on it. He expressly rejected the positivist view of separation, on which the history of law that is structured using modern concepts and classifications is based. Instead, Brunner intended to describe »the political structure of political entities in its entirety.«[155] His theoretical inspiration lies in

151 As argued by the prominent historian Albert Brackmann in a lecture at the academy in Berlin in 1929. On this and the ensuing discussion: Grünewald (1982), especially 86 ff.; for Kantorowicz's reply at the Historikertag 1930, including his position on positivism in research and historiography, see 91.

152 In his lecture at the Historikertag, printed in Grünewald (1982) 92.

153 Kantorowicz (1957), German: Die zwei Körper des Königs (1990).

154 Mitteis (1957).

155 P. 3 in the 5th edition, Vienna 1965, also Darmstadt 1973.

the constitutional and political teachings of Carl Schmitt, especially his historical-theoretical deconstruction of the foundations of the liberal constitutional state. To Schmitt, the political rests on a friend-foe relationship. On this basis Brunner posits the question what concept of law and state existed in the Middle Ages, when, as he describes in detail, feuds as a form of violent conflict, even against the ruler if necessary, were not an exception to normality, but rather part of the legal structure, and seen as legitimate. He thus energetically rejected the legal-historical construct, proposed mainly by Heinrich Brunner, to see feuds as a »separation of outlawry,« as such a separation presumes the existence of a positive structure of laws against the background of peace, which was ensured by the state's monopoly on violence (Max Weber). That condition materialized, he argued, not before the early modern state characterized by sovereignty came into existence. In place of the concept of the state Brunner posits for the Middle Ages the concept of lordship and authority, which he contrasts to the land. The land and its people are, in turn, the foundation of the establishment of a collective concept of law. In extensive remarks Otto Brunner establishes his line of argument by engaging with the history of law and the constitution in the 19th and 20th centuries, as we have described it as being divided into two perspectives, one advanced by, above all, Rudolph Sohm and Georg v. Below, and the other, presented by Otto v. Gierke, and carried on by Brunner himself.

It is certainly no coincidence that this frontal assault against the edifice of the history of law, which had derived from liberal, constitutional thought of the late German (and Austrian) 19th century, occurred in the 1930s. Otto Brunner belonged to the »völkisch« circles in Austria,[156] at first putting the concept of »order of the Volk« in a central place before in later editions he used the term »constitution« and, finally, »structure,« which was commonly used in international discourse. His reference to Carl Schmitt points in the same direction, a critique of liberalism. The history of how Brunner's writings were received shows, however, how his comprehensive approach on intellectual and constitutional history opposing the backward projections of constitutional positivism continues to be influential beyond these political and ideological issues. The rejection of such projections, the connection between the concept of the state and the monopoly on violence, the view of feud as a legitimate form of violence, as a structural condition of, rather than an exception to, the old legal order, remained and remain central to a new understanding of the Middle Ages, beyond the author's entanglements with contemporary political ideology when he wrote his studies. In this way the history of law was liberated from conceiving itself merely as being a provider of introductory history and a supplier of norms in current law, and free to turn toward researching factors pertaining to the historical dynamic between law and constitution, as well as the impact of normative structure on the various areas of life in society.

Whereas French scholarship on the Middle Ages, as we have suggested, proceeded on its own unique and consequential path toward establishing a new image of the Middle Ages, Anglo-American scholarship was impacted by the ideas and impulses of German-Jewish scholars who were compelled to leave Germany (such E. Kantorowicz, E. Rosenstock-Huessy, and St. Kuttner, among others). An American legal historian is especially important to us, because through him the incorporation of a world-historical dimension, which we have encountered in Eugen Rosenstock-Huessy's writings, had an impact reverberating back to Europe and to Germany: Harold J. Berman. Working at the time in the areas of comparative law and as a specialist on the socialist-Soviet system of law, Berman had studied in his youth with Rosenstock-Huessy after the latter had left Germany.[157] Berman not only appears to have gained a good knowledge of German and continental history of law from this relationship, but he had also been deeply impressed with Rosenstock-Huessy's theory of the West, having been shaped by a series of great revolutions. At an advanced age Berman took on the task of transforming this idea

156 An intensive and critical analysis of the conditions surrounding the development of the study has been presented by Algazi (1997); Algazi (1996).

157 See Dilcher (2013a).

into monographs on the history of law. His first study, entitled *Law and Revolution*, was published in 1983 and addressed the papal revolution started by Pope Gregory VII.[158] In old age Berman was able to complete a second part of this project in 2003, which addresses the impact of the Protestant reformations (German and English) at the beginning of the modern age, as indicated in the subtitle: »Impact on the Western Legal Tradition.«

In both volumes Berman refers expressly to Rosenstock-Huessy, but also draws on an organic understanding of law, represented by the great English legal historian and friend of Gierke, F. W. Maitland, and his use of biological metaphors.[159] As a counter model, though utterly useless for a transnational comparison, he saw a body of rules, interpreted in a positivist vein, that derived its legitimacy from the will of a »lawmaker.« Even though as a comparative scholar he was a positivist jurist, in this case he sided with a Romantic perspective on history. In his introduction to the first volume, in which he describes his motives, he begins with a poem of Archibald MacLeish entitled »A world ends when its metaphor has died.« He perceives the West to be at the end of such an age, and he sees law and the interpretation of law in the Western tradition, together with religion, as such a metaphor. But this time period at the end is of particular importance, he argued: as one finds oneself in such a revolutionary situation, one is able to gain a clear perspective on the beginnings and turning points. Berman perceives Western interpretation of law, in conjunction with certain forms of community and religion, to be doomed as a cultural metaphor. The recognition of this situation, he held, is of great importance for how the future of our culture will be shaped.

Based on this understanding of his task, and clearly following in Rosenstock-Huessy's footsteps, Berman describes, in a much more analytical way than the latter, his concept of revolution, as a principal transformation with long-lasting consequences. He analyzed the »Papal revolution« started by Gregory VII as such a profound revolutionary transformation of the world, in the realms of religion, politics, the intellectual world, and culture. One should remember that for a long time the historical situation at the time had been depicted in German historiography as a political battle between Emperor and the Pope over the investiture of imperial bishops, as *Investiturstreit*, and possibly hitting some national tones of a Prussian anti-Catholic culture war against Rome in doing so. Following Rosenstock (who, because of the political events at the time, but also because of his »Romantic« deviation from scientific tradition, had encountered little attention to his ideas in Germany), Berman attributes to this change the kind of fundamental significance for which it is now widely recognized; that is, concerning the relationship between religion and politics, and between secular and religious authority in the West, as a whole. For him the history of law therefore not only gains control over the periodization of history but also shapes crucial institutions that are important for further historical development: most importantly, the Roman church headed by the Pope develops into a hierarchical organization that is structured by assembled and, since Gratian, scientifically organized Canon law, further developed by Papal laws. Together with a bureaucracy and the exercise of universal power, it constitutes the first »state« in medieval history in the West, and thus a model for all future creations of states and the development of the law. Following its procedures and example, various new areas of law organize, from feudal to commercial and city laws to the legislation of kingdoms.

In this way Berman derives from his interpretation of the Papal revolution a perspective on the structure of the history of law and law's political and cultural significance for the history of the West. The editions and translation of both studies testify to the establishment of his perspective in scholarship and academic teaching in many countries, even though Berman's scholarship was not always up-to-date in regard to specific studies and his engagement with theory (for example, Max Weber's), is not fully convincing. Rosenstock-Huessy's point of view, as employed by Berman, anticipated many basic findings that later scholarship established for particular areas of the law. In this way the history of law regains a central place in the political and cultural history of the West. A perspective has been established that can

158 Berman (1983), preface. German edition (1991), preface.
159 Ibid., Introduction, 6 ff.

be used to determine the role of the West in relation to other cultures of the world. The legacy of the Historical School of Law has therewith transcended its national connections. The significance of religion for the development of law is fully included in this consideration once again.

V. Conclusion

1. *What remains?*

Our attempt to sketch out a long line of the Historical School of Law's continued influence, and particularly of the Germanists, by necessity had to leave out the consideration of many contemporary scholars and scholarly treatises on central issues. A final retrospective here is intended to demonstrate once more that the results of the analysis justify our approach.

Our perspective aims to depict the polar elements of Savigny's two-fold contribution, the Romantic and cultural-historical one on the one hand, and the rationalist-conceptual one on the other, as constituting a field of tension that provided fruitful results on a continuing basis. The rationalism of legal and historical scholarship presents itself, in contrast, as a kind of Basso continuo. This constellation remained present beyond expectations well into the 20th century. Not only Gierke, but also Rosenstock-Huessy, H. J. Berman, and E. Kantorowicz used arguments of Romanticism in deliberate and reflective ways against rationalist points of view.

The discussion extended to epistemological and philosophical core issues, such as the role of metaphysics in science. These issues pertain to a level that has to be considered foundational for the modern sciences of law and history, but that for the most part, in the context of positivism being dominant in these sciences, was not addressed. Concrete impulses for it came from the »Romantic« tradition of the Historical School of Law.

By recognizing that these discussions refer back to the polar nature of the theoretical approach established by Savigny during the »threshold period« at the beginning of modernity, we came up with an answer to the question about the »end« of the Historical School of Law that is different from the one that is typically provided when using the perspective of Romanist legal scholarship. Such an »end« did not occur with the decline of a direct influence of Savigny's »historical science of law« by mid-century. The powerful continuation of Germanists' approaches, especially in the writings of Otto von Gierke, demonstrates that the opposite is the case. In a different way this is also true for the Romanist sister science. Looking back at the penetrating analysis of Max Weber using the paradigm of rationalization, we were able to show that legal positivism and jurisprudence of concepts, contrary to more recent opinions, constitute definitive characteristics of late Pandectism. We can view these developments as one-sided over-extensions of Savigny's conceptual-rationalist approach. The opening-up of legal methodology that followed, in part in a revolutionary manner, especially in the free law movement, can thus be seen as a countermovement to an »exaggerated rationalization,« carried along by its own an inner logic. This development has opened the doors to a productive further development of private law after its codification in the German Civil Law Code. That this opening was also used by National Socialist jurists is another matter.

In order to be able to place Germanist law scholars in a larger historical framework it was important to regard them not merely, in parallel to Romanist law scholars, as administrators of domestic private law (in contrast to Roman private law). Rather, for their discipline and its scientific development it is important for us to consider Germanists' relationship to public law by looking at constitutional history. It led many »uncomfortable« Germanists to entangle themselves with, and make statements on, controversial basic political issues and conflicts and debates about them, from early constitutionalism's conflicts over the parliament of the St. Paul's Church to Gierke's *Genossenschaft*-based interpretation of the imperial constitution. Along this occurrence scholars trained as Germanists such as Laband in particular transferred the positivist-conceptual method, developed in private law, into the realm of public law, which Gierke opposed on the basis of a historically founded »Germanist« interpretation of the constitution.

The two methodological approaches that had been united by Savigny in regard to private law thus conflicted in public law. The positions of politically active Germanists, with their emphasis on topoi of »liberty« and »people,« were on the side of a broadly conceived »organic« liberalism. Demarcating themselves from the left wing of the liberals, who, leaning on France, continued the

rationalist-Enlightened tradition, this group attempted to find a separate German way of deriving a libertarian constitution from history. The group rather followed tradition in England and its constitutional history, but also traditions in the Netherlands, Switzerland, and the Scandinavian countries. For the members of this group, history serves as the foundation of a jointly experienced German national sentiment, and the development thereof, beyond traditional identities such as those of Prussia and Bavaria or the citizens of free imperial cities, and history establishes bridges to other »Germanic« nations in a European context.

Often – and not only by Gierke – European history is interpreted as the outcome of the interaction of Latin-Romance and Germanic elements. This interpretation, in turn, fits a perspective that views the formation of European nations' legal systems as having occurred on the basis of elements of Roman law and Germanic law. Using Friedrich Meinecke's concepts of »world citizenry and national state,« Franz Wieacker has aptly depicted it as both being in a state of tension as well as constituting a synthesis.

Given these circumstances a period of an extremely lively and fruitful scientific exchange between European nations occurred before and after the turn of the century, especially in the area of legal history and scholarship. For Germanist legal studies this occurred particularly in regard to its relations to England with a view toward the Anglo-Saxon foundations of Common Law, and in its relations to Scandinavia in regard to its foundation in the Common Germanic language. It also occurred in its relations to Italy in regard to the Lombards and the role and significance of Lombard law. In its relations to France, the common origin in the Frankish Empire remained a constant topic. Mutual scientific recognition in regard to all of these issues was at a high level that has hardly been reached since.

How little the »Germanist« direction in legal studies was perceived then as supportive of nationalist or racist exclusion can be seen when we consider not only international commentators on this subject at the time but also the fact that scholars from Jewish families were particularly attracted to Germanist legal studies after the profession had opened up to them: Levin Goldschmidt, Max Weber's *Doktorvater*, founded modern commercial law by integrating Romanist and Germanist scholarship; Max Pappenheim studied Nordic law in the Middle Ages; Ferdinand Frensdorff researched medieval city laws in Germany; and Felix Liebermann was an enthusiastic researcher of early medieval Anglo-Saxon law and editor of scholarly collections. Later, and politically more on the left, Hugo Sinzheimer in labor law and Hugo Preuss in public law would take up Otto von Gierke's Germanist-*genossenschaftlich* perspectives and independently develop them further.

These issues have to be considered as we wish to question an often-stated or -insinuated thesis: that of a continuity, or even causal relation, between Germanist studies in law and National Socialism. Our analysis has demonstrated how the origins and causes of the emergence of National Socialist ideology, and their development, as well as their intellectual and material assumption of power before and after 1933 can be understood on the basis of a precise historical contextualization of, and differentiation between, various mental attitudes and the transformations that are evident in them. In this way the intellectual diminution and vulgar character of this ideology becomes evident in relation to expressions of civic national sentiments and cultural awareness – which, indeed, feel strange to us as well. Some scholars, including some in the field of legal history, willingly accepted the diminution, while others unsuccessfully tried to keep themselves above the fray by being willing to contribute their scientific competence to the new world view (such as in the Academy for German Law).

Germanist legal scholars wanted not only to contribute the development of a rights-based constitutional state in Germany before and after the founding of the German empire, but also to use law to strengthen a consciousness about national identity. In doing so, they remained on the trajectory set by the founding of the schools by Savigny. Parallel efforts, perhaps engendered in part by the German Historical School of Law, can also be found in other European countries. This could result in the emergence of nationalist voices, but it occurred rather infrequently in pre-war Europe. Moreover, it was the Germanists especially – for whom Gierke might be adduced here once more as a model – who combined an emphasis on a national and on a social component, in the form of solidarity in society. For them the development of the nation state as a rights-based constitutional state had to go hand in hand with the creation of a welfare state (*Sozialstaat*), inclusive of a move-

ment from below, that of solidarity among the proletariat, which had been marginalized at first. Collective labor law, which at first was covered by criminal statutes, is an important area in this regard.

This alone should suffice to show that the unification of the national and the social in National Socialism was motivated by an entirely different spirit. It needs to be emphasized over and over again just how much the solid foundation of today's German welfare state rests on the earlier forging of links between the social-democratic and union-based workers' movements, and Catholic social teachings with their political equivalent in the political center, along with those between the Protestant-social movement and liberals as well as conservatives with a social orientation.

Negative views about such welfare-state-based approaches depicting them as illiberal or collectivist – and thus as providing a preparation for National Socialism – are not analytically useful but rather obscure the different perspectives. If these forces were not able lastingly to sustain the Weimar Republic, then our view gravitates toward the European catastrophe of WWI and the misguided structure for peace (or the lack thereof) thereafter. Both poisoned the originally progressive nationalist movements and charged them with resentment.

In order to demonstrate, however, how much political developments at that time derived from conflicts and decisions among particular individuals, and not from a fixation on continuities found in the realm of the history of ideas (which, in these contexts, remained important as frameworks), we have provided more space to the intellectual development of several particular individuals who shaped these developments in major ways.

We should emphasize one last finding. For the Germanists, the Middle Ages always were important for their research as well as their historical perspective. Initially, the interpretation of the Middle Ages gravitated toward underscoring its difference, or alterity, especially in delimiting it from the Latin character and rationality of the Romanists' subject matter. Jacob Grimm's *Rechtsalterthümer* evinces such a view, as does Albrecht's *Gewere* and his depiction of the personal and patrimonial foundations of the pre-constitutional princely state. This view was later replaced with rearward projections of conservative-liberal ideals onto the Middle Ages, serving, certainly, to legitimize individual political goals and objectives (v. Below's state of the German Middle Ages, or H. Brunner's Germanic-Franconian system of law as a part of contemporary legal science).

Gierke's depiction of the Middle Ages, based on rule and *Genossenschaft*, that is, social structure, constituted an opposing model. It rests on the consideration of social aspects in the tradition of the Germanists and a steady consideration of Roman and Canon law and the political theory associated with it. This point of view allowed German medievalists in the 20th century to develop a new perspective on the Middle Ages that was different, namely, depicting a period in which the state did not yet exist, and that emphasized the difference between this period and modernity. It also provided an interpretation of the ways in which modernity developed from scholasticism's rationality; of the connections between, and separation of, the spiritual and secular world; and the slow emergence of the state as a framework of authority no longer resting on the prince as a person. A parallel development took place in France at the same time, but it was based on different traditions in science there. In the U.S. scholars who had fled Germany assumed a crucial role with their contributions to a new perspective on the Middle Ages based on considerations of Canon law and political theory. Law played a crucial role for this perspective, though less so for the French Ecole des Annales. Overall, of central importance was the orientation of German Germanists in law toward a broader, »organic« concept of law, which found common ground with the French school in its consideration of social structure. At the same time, Canon and Roman law of the Middle Ages were no longer seen as being a pale reflection of the glory of Antiquity – a status assigned to it by neo-Humanism – but elevated to the status of a constitutive factor in the development of western history, and thus became a central aspect of our current European perspective.

Two interpretations of western legal and constitutional history that developed from the Historical School of Law are therefore the foundations for ascertaining the West's own position on a large spectrum of cultures existing alongside (and sometimes conflicting with) one another: The rationalization thesis by Max Weber on the one hand, and the thesis by Rosenstock and Berman about the decisive impact of a series of revolutions on the other. Their criteria are incompatible, as both

emphasize the uniqueness and distinctiveness of Western development as well as the special role of law. Both consider the Middle Ages as the formative period in shaping the cultural character of Europe.

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